(1)

Supreme Court, U.S.
FILED

04 777 DEC - 6 2004

No.

In The

Supreme Court of the United States

Sheila Wimbush-Bowles and Betty Conine,
Individually and on Behalf of All Others
Similarly Situated,

Petitioners

v.

GTE Service Corporation Plan for Employees' Pensions and
GTE Telephone Operations Pension Plan,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari

Bradley J. Schram
Robert P. Geller
Eva T. Cantarella *
Hertz, Schram & Saretsky, P.C.
1760 S. Telegraph Rd., Ste. 300
Bloomfield Hills, MI 48302
(248) 335-5000

Allen Engerman
Law Offices of
Allen C. Engerman, Ltd.
666 Dundee Rd., Ste. 1200
Northbrook, Ill. 60062
(847) 564-5555

Counsel for Petitioners

December 6, 2004

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

In the early 1970s, Congress conducted a study on employer-provided pension plans, and found that "many employees with long years of employment [were] losing anticipated retirement benefits" due to the lack of minimum standards. 29 U.S.C. §1001 ("Congressional findings and declaration of policy") (A-62). To remedy this problem, Congress enacted, in 1974, the Employee Retirement Income Security Act ("ERISA"), which established certain minimum standards respecting employer-provided pension benefits. Id.

Among other things, ERISA establishes the criteria for determining whether an employer-provided benefit is an accrued pension benefit or, instead, a "welfare" benefit. This Petition concerns whether the Eleventh Circuit applied the proper criteria or, instead, imposed its own criteria when it reversed the District Court and determined that a supplemental benefit paid pursuant to an involuntary separation program constituted an accrued pension benefit, rather than a severance (i.e., welfare) benefit. The issue is critically important because, if a welfare benefit may be re-characterized as an accrued pension benefit, employers may decide to do what respondents did here–use the welfare benefit to satisfy, in part, ERISA obligations respecting payment of the accrued pension benefit. This manipulation effectively devalues the accrued pension benefit, and thereby provides participants with less than their full retirement benefit.

This Petition finds the parties in positions with which they are unfamiliar. As noted by the District Court, pension plan participants typically endeavor to characterize ancillary benefits paid out of a pension plan as "accrued benefits" because of the various protections afforded such benefits under ERISA. Sponsors of pension plans, who desire to retain flexibility in the structuring and offering of benefits that are not retirement benefits, vehemently argue that such benefits are "welfare benefits" and are not entitled to the preferred treatment ERISA accords "accrued benefits." Petitioners

represent a group of participants far greater in number than the Class certified in the District Court. Indeed, the Eleventh Circuit's decision potentially impacts all pension plan participants throughout the nation, as it enables employers to (1) circumvent the valuation rules applicable to accrued benefits under ERISA §205(g)(3), (2) deny participants the full value of their accrued benefits or render illusory any promise of a supplemental welfare benefit, and (3) subvert ERISA's remedial purposes.

In the courts below, respondents acknowledged that they computed the lump sum present value of petitioners' accrued pension benefits using an interest rate that exceeded the maximum rate permitted under ERISA §205(g)(3), 29 U.S.C. §1055(g) (A-68), commonly known as the "present value" rule. Respondents justified their use of the unlawfully high rate (which resulted in a lower payout to petitioners) by contending that a supplemental benefit ("the SEP"), which petitioners received pursuant to a limited program of involuntary separation ("the ISEP"), could be added to petitioners' "regular" accrued pension benefit when determining whether petitioners received the statutory minimum lump sum. Recognizing that ERISA §205(g)(3) governs solely accrued pension benefits, respondents deemed the SEP an accrued pension benefit in order to satisfy the strict present value test, thereby depriving petitioners of their statutory minimum lump sum. Respondents acknowledged that, if the SEP was not an accrued pension benefit, petitioners would prevail on their claim that respondents violated ERISA §205(g)(3).

After a three-day bench trial on petitioners' claims, the District Court found that the SEP was a severance benefit, not an accrued pension benefit. This finding was supported by (1) ERISA §3(1), which states that, if the "purpose" of a plan, fund, or program is to provide severance or other welfare benefits to the employer's employees, the benefits thereunder are welfare benefits, not pension benefits; (2) ERISA §3(23), which states that a participant's accrued pension benefit is the accrued benefit "determined under the plan"; (3) provisions in

the respondents' pension plans that expressly state that the SEP is *not* an accrued pension benefit or additional accrued pension benefit; and (4) considerable documentary and testimonial evidence, including the testimony of respondents' top benefits personnel, that the ISEP was intended to be a severance program and that the SEP was intended to be a severance benefit.

Having found that the SEP was a severance benefit, and not an accrued pension benefit, the District Court held that the SEP must be excluded from any analysis relative to respondents' payment of the minimum lump sum required under ERISA §205(g)(3). Accordingly, the District Court granted summary judgment for petitioners on their claim that respondents violated ERISA §205(g)(3).

In an opinion that wholly ignored the overwhelming evidence that the purpose of the ISEP was to provide severance benefits, the Eleventh Circuit reversed, holding that the SEP *was* an accrued pension benefit because it was payable at the same time and in the same form as petitioners' regular pension benefit (i.e., as an annuity or lump sum). Despite the unequivocal pronouncement in ERISA §3(1) that severance benefits constitute welfare benefits, the Eleventh Circuit focused on the available *forms* of payment and *timing* of the SEP, rather than its *purpose* (see Introduction). Therefore, **the question before the Court is–**

> Whether a supplemental benefit paid out of an ERISA-governed pension plan pursuant to a limited program of separation, the undisputed "purpose" of which is to provide severance payments to employees who separate under the program, is a severance benefit (as held by the District Court) or an accrued pension benefit (as held by the Eleventh Circuit)?

The answer to this question will impact (1) the benefit entitlement and retirement security of over 5,000 Class members represented in this case, and (2) potentially, the benefit entitlement and retirement security of millions of other

pension plan participants whose employers may elect (as respondents did here) to use a welfare benefit paid out of the pension plan to pay for a corporate expense and simultaneously claim that the payment satisfies ERISA's requirements governing valuation and payment of the accrued pension benefit.

If the Court decides that the supplemental benefit described in the Question Presented *is* an accrued pension benefit, petitioners request that the Court also answer the following **Conditional Question**:

> Whether a supplemental accrued pension benefit that is not part of the participant's "regular" accrued pension benefit is subject to the actuarial equivalence rule under ERISA §204(c)(3)?

ERISA §204(c)(3) provides that, if an accrued pension benefit is paid in an amount other than an annuity commencing at normal retirement age (here, age 65), the legally accrued benefit is an annuity commencing at normal retirement age that is actuarially equivalent to that amount. Although the plain language of ERISA §204(c)(3) indicates that Congress intended this actuarial equivalence rule to apply to *all* accrued benefits, supplemental or otherwise, in testing whether petitioners received the statutory minimum lump sum, respondents converted petitioners' SEP, an immediately payable lump sum, into an annuity commencing at age 65 that, according to respondents' own expert, had a value equal to only one-third of the immediate lump sum amount.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are identified in the caption of the case. Respondents GTE Service Corporation Plan for Employees' Pensions ("Service Plan") and GTE Telephone Operations Pension Plan ("TelOps Plan") (collectively, "Plans") are defined benefit pension plans governed by ERISA. At all relevant times, the Plans were sponsored by GTE Service Corporation ("Service Corporation") and GTE Telephone Operations ("TelOps"). GTE Corporation was the Service Corporation's and TelOps's parent. On information and belief, the Plans have not issued shares to the public.

On December 31, 1995, the TelOps Plan merged in the Service Plan and, thereafter, the TelOps Plan ceased to exist. In June of 2000, GTE merged into Verizon Communications and, thereafter, GTE ceased to exist.

Petitioner Sheila Wimbush-Bowles ("Bowles") was a participant in the Service Plan, and petitioner Betty Conine ("Conine") was a participant in the TelOps Plan. Bowles and Conine represent the following Class which was certified in the United States District Court for the Middle District of Florida:

> All persons who received, or whose designated beneficiary or recipient received, both a SEP Lump Sum and a Deferred Vested Pension (as those terms are defined in the Plans) in the form of a lump sum, wherein the present value of the Deferred Vested Pension was computed utilizing an interest rate that was higher than the interest rate permitted under the Plans and ERISA §205(g), but excluding plan participants and/or their beneficiaries who received ISEP or VSIP benefits after December 1999.

CORPORATE DISCLOSURE STATEMENT

The petition is filed on behalf of Bowles, Conine, and all other similarly situated *individuals* (i.e., the Class). Therefore, a corporate disclosure statement is not applicable. Supreme Court Rule 29.6.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS v

CORPORATE DISCLOSURE STATEMENT vi

TABLE OF CONTENTS vii

TABLE OF CITED AUTHORITIES x

OPINIONS BELOW 1

JURISDICTION 1

PRINCIPAL STATUTES AND REGULATIONS 2

INTRODUCTION 3

STATEMENT OF THE CASE 4

A. Facts 4

Main Plan features 4

The ISEP and VSIP programs 5

Petitioners separated under an ISEP and elected lump sum distributions 6

Respondents used an unlawfully high interest rate to compute the lump sum present value of petitioners' pensions 7

B. Proceedings Below 8

REASONS FOR GRANTING THE PETITION 9

I. Review Is Warranted Because ERISA Defines an Individual's Accrued Pension Benefit as the Accrued benefit "Determined Under the Plan"; and, Although the Plan Expressly States that the SEP Is Not an Accrued Benefit, the Eleventh Circuit Nevertheless Held that It *Was* an Accrued Benefit 9

II. Review Is Warranted Because, Under ERISA, to the Extent the "Purpose" of a Plan, Fund, or Program Is to Provide Severance Payments to the Employers' Employees, the Benefits Thereunder Are Welfare Benefits, Not Pension Benefits; and, as Found by the District Court, the Evidence Overwhelmingly Established that the "Purpose" of the ISEP Was to Provide Severance Benefits ... 13

ERISA §3(1) and enforcing DOL regulations 13

The testimony of respondents' own witnesses 16

The summary booklets describing the ISEP 17

The waiver and release agreements 18

Petitioners' termination documents 19

III. Review Is Warranted Because the Eleventh Circuit's Decision Is in Direct Conflict With This Court's Rulings in Hughes, Lockheed, Shaw, and Alessi 20

IV. Review Is Warranted Because the Eleventh Circuit Applied a Flawed Legal Analysis and, in Addition, Misapprehended the Undisputed Facts 22

V. *Regarding the Conditional Question Presented,* Review Is Warranted Because Accrued Benefits Must Comply with ERISA's Actuarial Equivalence Rule, but, When Respondents Performed Their ERISA §205(g)(3) Compliance Analysis, They Converted Petitioners' SEP Lump Sum Into an Annuity that Was Worth Only One-Third That Amount 25

CONCLUSION 30

TABLE OF CONTENTS TO APPENDIX ..... A-i

TABLE OF CITED AUTHORITIES

Cases--Supreme Court

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 20, 21

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 20, 21

Lockheed Corp. v. Spink,
517 U.S. 882 (1996) 20, 21

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 20, 21

Cases-Court of Appeals and District Court

Bellas v. CBS, Inc.,
221 F.3d 517 (3rd Cir. 2000) 24

Harms v. Cavenham Forest Industs. Inc.,
984 F.2d 686 (5th Cir. 1993) 24

Hickey v. Chicago Truck Drivers,
Helpers & Warehouse Workers Union,
980 F.2d 465 (7th Cir. 1992) 24

Kohl v. Association of Trial Lawyers of America,
183 F.R.D. 475 (D.Md. 1998)) 24

Loskill v. Barnett Banks, Inc. Sev. Pay Plan,
289 F.3d 734 (11th Cir. 2002) 18

Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan, 29 F.3d 1235 (11th Cir. 1999) 10, 11, 22

Shaw v. International Assoc. of Machinists & Aerospace Workers Pen. Plan., 750 F.2d 1458 (9th Cir. 1985) 24

Jurisdictional Statutes (Supreme Court)

28 U.S.C. §1254(1) 1

Labor Statutes Incorporated in ERISA

29 U.S.C. §186(c) 2, 13, 21

ERISA Statutes

29 U.S.C. §1001 [ERISA §2] i

29 U.S.C. §1002(1) [ERISA §3(1)] ..... *passim*

29 U.S.C. §1002(2) [ERISA §3(2)] 2, 21

29 U.S.C. §1002(3) [ERISA §3(3)] 21

29 U.S.C. §1002(19) [ERISA §3(19)] 19

29 U.S.C. §1002(23) [ERISA §3(23)] ..... ii, 2, 9, 29

29 U.S.C. §1053(a)(1)-(2) [ERISA §203(a)(1)-(2)] 19

29 U.S.C. §1054(c)(3) [ERISA §204(c)(3)] iv, 2, 8, 9, 26, 28-30

29 U.S.C. §1055(g) [ERISA §205(g)] ..... *passim*

29 U.S.C. §1132 [ERISA §502] 1, 10

Internal Revenue Code Statutes

26 U.S.C. §401(a)(4) 24

26 U.S.C. §411(c)(3) 29

26 U.S.C. §411(d)(6) 24

26 U.S.C. §412(l)(7)(B) 24

26 U.S.C. §417(e)(3) 7, 29

Department of Labor Regulations

29 C.F.R. §2510.3-1(a)(3) 2, 13

29 C.F.R. §2510.3-2(b) 2, 13-15

Treasury Regulations

26 C.F.R. §1.401(a)(4)-3(f)(5) 24

26 C.F.R. §1.401(a)(4)-4(e)(2) 24

26 C.F.R. §1.411(a)-4 19

26 C.F.R. §1.411(a)-7(a) 9

26 C.F.R. §1.411(a)-7(c) 9

26 C.F.R. §1.417(e)-1(d) 2, 7, 29

Other Treasury/IRS Authority

IRS Notice 2003-10
2003-5 I.R.B. 369; 2003 WL 77005 (Feb. 3, 2003) 24

IRS Notice 97-11
1997-1 C.B. 379; 1197-2 I.R.B.
1996 WL 747904 (Jan. 13, 1997) 28

Rev. Rul. 92-66
1992-36 I.R.B. 11; 1992 WL 200296 (Aug. 20, 1992) 24

Legislative History

H.R. Rep. No. 93-807,
1974 U.S.C.C.A.N. 4639 (Feb. 21, 1974) 10

H.R. Conf. Rep. No. 93-1280,
1974 U.S.C.C.A.N. (Aug. 12, 1974) 10

Other Authoritative Materials

Private Pensions, Implications of Conversions
to Cash Balance Plans
GAO/HEHS-00-185 (Sept. 29, 2000) 16

OPINIONS BELOW

District Court

Order, Granting Summary Judgment to Plaintiffs' on Count II (Violation of ERISA §205(g)(3)) (filed 10/30/01) (unpub) (A-1)

Order, Granting Plaintiffs' Motion for Class Damages and Prejudgment Interest (filed 5/06/02) (unpub) (A-28)

Order, Clarifying and Reaffirming Court's Earlier Award of Prejudgment Interest (filed 7/22/02) (unpub) (A-36)

Order and Final Judgment (filed 9/11/02) (unpub) (A-38)

Eleventh Circuit

Opinion, Reversing Judgment for Plaintiffs, 2004 WL 392918 (filed 2/03/04) (unpub) (A-45)

Judgement Respecting the Opinion (filed 2/03/04) (unpub) (A-58)

Order Denying Petition for Rehearing En Banc (filed 9/08/04) (unpub) (A-59)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). Petitioners seek review of a decision of the Eleventh Circuit Court of Appeals, entered February 3, 2004 (A-45), which reversed the District Court's grant of summary judgement for petitioners on their claim that respondents violated ERISA §205(g)(3). An order denying petitioners' Petition for Rehearing En Banc was entered September 8, 2004 (A-59). The basis for federal jurisdiction in the District Court was ERISA §502(e), 29 U.S.C. §1132(e) (A-69).

PRINCIPAL STATUTES AND REGULATIONS

Question Presented

29 U.S.C. §1002(1) (if "purpose" of plan, fund or program is to provide benefits described in §186(c) of Title 29, it is a welfare plan) (A-64)

29 U.S.C. §186 (describes "severance" benefits) (A-61)

29 C.F.R. §2510.3-1(a)(3) ("effect" of 29 U.S.C. §1002(1) is "to include within the definition of 'welfare plan' those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized") (A-74)

29 U.S.C. §1002(2) (under rules prescribed by the Secretary of Labor, severance pay arrangements "shall" be treated as welfare plans) (A-64)

29 C.F.R. §2510.3-2(b) (rule describing severance pay arrangements that are not pension plans) (A-75)

29 U.S.C. §1002(23) (accrued benefit under a defined benefit pension plans is the accrued benefit "determined under the plan") (A-66)

Conditional Question Presented

29 U.S.C. §1054(c)(3) (if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, the employee's accrued benefit shall be the actuarial equivalent of such amount) (A-67)

29 U.S.C. §1055(g) ("present value rule"; specifies maximum discount rate for computing present value of annuity) (A-68)

26 C.F.R. §1.417(e)-1(d) (enforces present value rule) (A-80)

INTRODUCTION

This case stems from respondents' erroneous use of an interest discount rate in excess of the maximum rate permitted under ERISA §205(g)(3), 29 U.S.C. §1055(g)(3) (A-68), in computing the lump sum present value of petitioners' accrued benefits. Respondents conceded that they used an unlawfully high rate, but justified its use by insisting that a supplemental benefit ("the SEP"), which petitioners received under a special involuntary separation program ("the ISEP") and in a lump sum form, could be considered in determining whether petitioners received the statutory minimum lump sum. Respondents posited that, if petitioners' regular pension benefit and SEP were added together and then discounted to present value using the statutory rate, the resultant amount would be less than petitioners' aggregate lump sum distribution. Thus, according to respondents, petitioners received *more* than the statutory minimum. Recognizing that ERISA §205(g)(3) applies exclusively to accrued pension benefits, respondents argued that the SEP represented an accrued pension benefit. Respondents acknowledged that if the SEP was not an accrued pension benefit, petitioners received less than the statutory minimum.

Pursuant to ERISA §3(1), if the "purpose "of a plan, fund, or program is to provide severance or other welfare benefits, it is a welfare plan (not a pension plan), and the benefits thereunder are welfare benefits (not pension benefits). The Plans here expressly state that the SEP is not an accrued pension benefit or any part thereof. Moreover, respondents' own witnesses testified that the ISEP was intended to be a severance program and that the SEP was intended to be a severance benefit. This testimony was consistent with myriad documents generated by or on behalf of respondents, all of which refer to the SEP as a separation payment, separation amount, or severance benefit, but *never* as a pension benefit. Not surprisingly, the District Court found that the "purpose" of the ISEP was to provide severance benefits to employees who were involuntarily separated and, therefore, the SEP was

a severance benefit, not an accrued pension benefit (A-4, 22, 23). Accordingly, the District Court (1) held that the SEP must be excluded when determining if petitioners received the statutory minimum lump sum, and (2) granted summary judgment for petitioners on their claim that respondents violated ERISA §205(g)(3) (A-25).

The Eleventh Circuit reversed, reasoning that the SEP *was* an accrued pension benefit because it was payable at the same time and in the same form as petitioners' regular pension benefit (A-47, 51, 52). Thus, the Eleventh Circuit improperly relied on the timing of the payment of the SEP and the form in which it could be paid, rather than its purpose. Petitioners submit that this analysis was legally flawed because, as just noted, ERISA §3(1) requires examination of the "purpose" of the benefit. Narrowly defined, **the issue before the Court is whether a supplemental benefit paid out of a pension plan under a limited program of separations, and for the admitted "purpose" of providing severance benefits, is a welfare benefit or an accrued pension benefit.**

STATEMENT OF THE CASE

A. Facts

Main Plan features

Bowles was a participant in the Service Plan, and Conine was a participant in the TelOps Plan. The terms of both Plans are materially the same. Therefore, unless otherwise noted, this Petition refers solely to the Service Plan.

The Plan describes four types of Pensions: a Service Pension, a Deferred Vested Pension ("DVP"), a Disability Pension, and a Spouse's Pension. Plan at Def. of Pension (A-96). Each is a life annuity commencing at normal retirement age ("NRA"), which the Plan defines as age 65. Id. at Def. of NRA and §§6.1, 6.3, 6.5 (A-95, 99, 103). The DVP, the accrued benefit at issue here, is payable to participants who separate from GTE with at least 5 years of service, and is computed

using the formula for determining the Service Pension in §6.1 of the Plan. Id. (A-102). Section 6.1 requires that a percentage of the employee's 5-year final average compensation be multiplied by the employee's years of service. Id. (A-99). The resultant annuity is the participant's accrued benefit, as the Plan expressly defines the "Accrued Benefit" for *any* participant at *any* time as the annuity computed in accordance with §6.1 of the Plan. Id. (A-95). As explained below, the SEP was not computed in accordance with §6.1 of the Plan.

The ISEP and VSIP programs

Commencing in the early 1990s, GTE adopted amendments to the Plan that established separation programs designed to trim its workforce. These programs were referred to as the Voluntary Separation Incentive Program ("VSIP") and Involuntary Separation Program ("ISEP"). Petitioners separated under ISEPs created under Article XXII of the Service Plan and Article XXXIII of the TelOps Plan. As the terms of these Articles are materially the same, this Petition refers exclusively to Article XXII of the Service Plan.

The express purpose of Article XXII was to provide employees who separated from GTE between specified dates "with additional benefits." Article XXII, §22.1 (A-104) (emphasis added). These employees, referred to as Special Separatees, were entitled to receive their DVP plus an "enhancement"--a supplemental annuity, referred to as the SEP Annuity. Id., §§22.2(r), 22.6, 22.7 (A-106, 108, 109). As defined, the SEP Annuity is an annuity that is actuarially equivalent to an "immediately" payable lump sum, referred to as the SEP Lump Sum, with actuarial equivalence based on the Special Separatee's "actual age" and specified interest rates and mortality. Id., §22.2(m) (A-105). The SEP Lump Sum is a "fixed" amount, computed as a percentage of the Special Separatee's 3-year final average earnings. Id., §22.2(n) (A-105).

Under the ISEP, Special Separatees could elect to receive their DVP in a lump sum form, payable immediately, at NRA, or at any other time before NRA. If the Special

Separatee elected to receive his/her Pension in a lump sum, he/she was required to also take the SEP Annuity in a lump sum form and at the same time. Article XXII, §22.8(b), (c) (A-110-112). Regardless of the form chosen, however, Article XXII emphasized that the SEP was not an "accrued benefit" or any part thereof:

> **(a) No benefit shall accrue under this Article XXII. This Article XXII does not provide for an accrued benefit or an additional accrued benefit for any Employee, and the enhancement of a Special Retiree's Pension under Section 22.5, 22.6, or 22.7 does not constitute, and shall not be deemed to be, an accrued benefit.**

Id., §22.8(a) (A-110) (emphasis added). Rita Galgano, GTE's Manager of Benefits Strategy and Design, testified that lawyers drafted the ISEPs and VSIPs and that she "ma[d]e sure that they say what we want it to say according to the plan design." 4/18/01 Trial Transcript ("TT") (A-140-142).

Petitioners separated under an ISEP and elected lump sum distributions

In 1993, at age 40 and having completed over 14 years of service with GTE, Bowles separated from the company under the ISEP created by Article XXII. Two years later, at age 45 and also having completed over 14 years of service with the company, Conine separated from GTE under the ISEP created by Article XXXIII. Petitioners elected to receive their DVP in the form of an immediate lump sum and, as a result, received an immediate SEP Lump Sum. The SEP Lump Sum was properly computed; the DVP lump sum was not.

Respondents used an unlawfully high discount rate to compute the lump sum present value of petitioners' pensions

Pursuant to ERISA §205(g)(3), as formulated before 1995,[1] the present value of a participant's accrued annuity benefit must be no less than the present value computed using the interest rate(s) that would be used by the Pension Benefit Guaranty Corporation ("PBGC") to value an annuity. 29 U.S.C. §1055(g)(3) (A-68).[2] It is undisputed that the PBGC uses an "immediate" rate and a series of lesser "deferred" rates to value annuities, and that respondents used solely the immediate rate to compute petitioners' DVP lump sums. A higher discount rate produces a lower present value. Therefore, respondents' use of solely the immediate rate, rather than the immediate rate and lesser deferred rates, resulted in the payment to petitioners of DVP lump sums that did not satisfy the statutory minimum.

Respondents acknowledged that their use of the single PBGC immediate rate would ordinarily violate ERISA §205(g)(3). They argued, however, that Treasury Regulation ("TR") 1.417(e)-1(d), which enforces ERISA §205(g)(3), provides that the present value of an accrued benefit be no less than the present value of the participant's normal retirement benefit ("NRB"), determined using the interest rates set forth in Internal Revenue Code ("Code") §417(e)(3) (A-73), the Code analogue to ERISA §205(g)(3). 26 C.F.R. §1.417(e)-1(d) (A-80). Respondents insisted that the SEP Annuity *was* part of petitioners' NRB because (1) ERISA defines the NRB as the benefit under the plan commencing at NRA (here, age 65); (2) under the ISEP, the DVP and SEP are payable at the same time

---

[1] In the District Court and Court of Appeals the parties agreed that the pre-1995 version of ERISA §205(g)(3) governs.

[2] Employers could use 120% of the PBGC rate(s) if the present value exceeded $25,000 after applying the PBGC rate(s). 29 U.S.C. §1055(g)(3) (A-68).

and in the same form; and (3) if petitioners' had elected to receive their DVP in the form of an annuity commencing at age 65, their SEP would have been a SEP Annuity commencing at age 65. Respondents then posited that, if petitioners' age-65 DVP annuity and age-65 SEP Annuity were combined and then discounted to present value using the PBGC immediate rate and lesser deferred rates, the resultant lump sum would be less than petitioners' aggregate lump sum distribution (i.e., DVP lump sum + SEP Lump Sum). In respondents view, petitioners received more than the statutory minimum.

As elucidated below, the SEP was a severance benefit, not an accrued benefit or part thereof. Therefore, it should not have been included in respondents' ERISA §205(g)(3) compliance analysis. By including the SEP in that test, the Eleventh Circuit effectively sanitized respondents' statutory violation arising from their use of solely the PBGC immediate rate to compute the present value of petitioners' DVP.

Regarding the Conditional Question Presented, even if the SEP *were* an accrued benefit or part thereof, it is undisputed that the age-65 SEP Annuity respondents computed for their ERISA §205(g)(3) compliance test was not actuarially equivalent to petitioners' SEP--a lump sum payable immediately--but was worth only one-third this immediately payable amount. This violated the actuarial equivalence rule under ERISA §204(c)(3), and renders erroneous respondents' and the Panel's conclusion that petitioners received more than the statutory minimum.

B. Proceedings Below

Petitioners' Amended Complaint alleged that respondents used an unlawfully high interest rate to discount to present value their accrued pension benefit (the DVP), thereby violating (1) their ERISA fiduciary duties (Count I), (2) the present value rules under ERISA §205(g) (Count II), and (3) the terms of the Plan (Count III). Count I was dismissed for reasons not pertinent here. Thereafter, the District Court conducted a three-day bench trial which resulted in the

dismissal of Count III, but the entry of summary judgment for petitioners on Count II (Violation of ERISA §205(g) (A-1). These rulings were followed by Orders, awarding prejudgment interest to petitioners (A-28, A-36). Petitioners appealed the prejudgment interest award as being too low, and respondents cross-appealed the judgment for petitioners on Count II. On February 3, 2004, the Eleventh Circuit reversed the District Court's judgment for petitioners on Count II (A-45) and, therefore, never reached the prejudgment interest issues.[3] Petitioners' request for en banc review was denied on September 8, 2004 (A-59).

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because ERISA Defines an Individual's Accrued Pension Benefit as the Accrued Benefit "Determined Under the Plan"; and, although the Plan Expressly States that the SEP Is Not an Accrued Benefit, the Eleventh Circuit Nevertheless Held that It *Was* an Accrued Benefit.

ERISA defines the "accrued benefit" under a defined benefit pension plan as "the individual's accrued benefit determined under the plan, and except as provided in section 1054(c)(3) of this title [ERISA §204(c)(3)], expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. §1002(23) (A-66) (emphasis added). TR 1.411(a)-7(a) (A-79) provides a nearly identical definition of the term "accrued benefit" and emphasizes that the term refers exclusively to pension or retirement benefits; it does not include ancillary benefits not directly related to retirement. TR 1.411(a)-7(c) (A-79) similarly explains that a participants' normal retirement benefit must be "determined without

---

[3] Oddly, during oral argument, the Panel asked no question of either party about the merits, and only asked a few questions about prejudgment interest.

regard to ancillary benefits not directly related to retirement benefits such as medical benefits or disability benefits." These rules favor employers whose pension plans also provide ancillary benefits, as ancillary benefits are not subject to ERISA's minimum vesting rules and, therefore, may be modified or eliminated.[4]

Although respondents availed themselves of these rules (by expressly stating in Article XXII that the SEP was not an accrued benefit, or any part thereof), in this litigation they argued that the SEP must be an accrued pension benefit because otherwise a plan administrator could simply refuse to pay a benefit such as the SEP–a notion inimical to ERISA's purpose of ensuring that participants receive their employer-provided benefits. However, under 29 U.S.C. §1132(a)(1)(B) (A-69), a participant may recover any type of benefit payable under the terms of an ERISA plan. Therefore, petitioners' position that the SEP is a severance benefit, not an accrued pension benefit, does not undercut ERISA's purpose of protecting participants' interests in their employer-provided benefits. To the contrary, petitioners' position ensures that, where a participant is eligible for both a severance benefit and an accrued pension benefit, and elects receipt of the pension in a lump sum form, he/she will receive the full present value of the pension benefit.

Because ERISA defines the accrued benefit under a defined benefit pension plan as the individual's accrued benefit determined under the plan, the Courts of Appeals consistently look to the plan's own terms in determining the plaintiff's accrued benefit. See, e.g., Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan, 229 F.3d 1235 (11th Cir. 1999) (per curiam). In Lyons, defendants argued that Mr. Lyons's accrued benefit was the amount credited to a

---

[4] As noted in ERISA's legislative history, to require the vesting of ancillary benefits would unduly burden pension plans. H.R. Rep. No. 93-807, 1974 U.S.C.C.A.N. 4639, 4726 (A-93); H.R. Conf. Rep. 93-1280, 1974 U.S.C.C.A.N. 4038, 5054 (A-93).

"hypothetical" bookkeeping account, rather than the accrued benefit defined under the plan, which was an annuity commencing at age 65. In an unanimous opinion, the Eleventh Circuit adopted Mr. Lyons argument, specifically noting ERISA's definition of "accrued benefit" and that the plan defined the "Accrued Benefit" as an annuity commencing at age 65. Id. at 1251. **This case compels the same analysis and conclusion.**

The Plan defines the "Accrued Benefit" for *any* participant at *any* time as the Service Pension computed "in accordance with" §6.1 of the Plan. Plan at Def. of Accrued Benefit (A-95). Neither the SEP Annuity nor SEP Lump Sum is computed in accordance with §6.1. Indeed, their respective formulas significantly deviate from the formula prescribed in §6.1.[5] Perhaps not surprisingly, Article XXII expressly states that the SEP is not an accrued benefit:

> **(a) No benefit shall accrue under this Article XXII. This Article XXII does not provide for an accrued benefit or an additional accrued benefit for any Employee, and the enhancement of a Special Retiree's Pension under Section 22.5, 22.6, or 22.7 does not constitute, and shall not be deemed to be, an accrued benefit.**

Article XXII, §22.8(a) (A-110) (emphasis added).[6] Thus, under the Plans' own terms the SEP is not an accrued pension

---

[5] See Plan, §6.1 (formula for computing the accrued benefit) (A-99); and Article XXII, §§22.2(m), (n) (SEP formulas) (A-105).

[6] Although this provision refers to Special Retirees, rather than Special Separatees, in the courts below, it was undisputed that this provision also applies to Special Separatees because §§22.6 and 22.7 (referenced in the provision) apply solely to the VSIP and ISEP, and only Special Separatees are eligible for benefits under the VSIP and ISEP. Article XXII, §§22.6, 22.7 (A-108, 109).

benefit. This conclusion is further supported by another Article XXII provision which tracks the language and requirements of ERISA §205(g)(3), but expressly excludes consideration of the SEP in determining the value of the accrued benefit:

> For purposes of this Article XXII, actuarial equivalence shall be determined . . . [using]:
>
> * * *
>
> (I) the PBGC interest rate, if the vested accrued benefit to be distributed applying the PBGC interest rate is not more than $25,000; or
>
> (II) an interest rate equal to 120 percent of the PBGC interest rate, if the vested accrued benefit to be distributed applying the PBGC interest rate is more than $25,0000, but in no event will the amount of the lump sum computed under this subparagraph (B) be less than $25,0000.
>
> For purposes of this subparagraph (B), the Transition Annuity or SEP Annuity shall be disregarded in determining whether a Participant's vested accrued benefit exceeds $25,0000 (and thus whether clause (I) or (II) of this subparagraph (B) applies).

Article XXII, §22.8(c)(B) (A-111-112) (emphasis added). Obviously, if the SEP *were* an accrued benefit, respondents would not have "disregarded" it in determining the value of the accrued benefit under this present value provision.

Relying on these Plan provisions, the District Court correctly found that the SEP was not an accrued benefit and, therefore, could not be considered in determining whether petitioners' received the statutory minimum lump sum under ERISA §205(g)(3). Although the unambiguous terms of Article XXII, alone, justified entry of a judgment in favor of

petitioners, the District Court's holding is buttressed by ERISA §3(1), enforcing DOL regulations, and testimonial and documentary evidence that unequivocally established that the SEP was intended to be a severance benefit, not a pension benefit. By refusing to enforce the Plan's own unambiguous terms, the Eleventh Circuit endorsed respondents' post hoc rationalization for using an impermissible discount rate, an outcome entirely at odds with ERISA's remedial objectives.

II. Review Is Warranted Because, Under ERISA, to the Extent the "Purpose" of a Plan, Fund, or Program Is to Provide Severance Payments to the Employers' Employees, the Benefits Thereunder Are Welfare Benefits, Not Pension Benefits; and, as Found by the District Court, the Evidence Overwhelmingly Established that the "Purpose" of the ISEP Was to Provide Severance Benefits.

ERISA §3(1) and enforcing DOL regulations

Pursuant to ERISA §3(1), to the extent the "purpose" of a plan, fund, or program is to provide severance payments to the employer's employees, the benefits thereunder are welfare benefits, not pension benefits. See 29 U.S.C. §1002(1) (A-64) (incorporating 29 U.S.C. §186(c) (A-61) (describing severance benefits)). DOL regulation 2510.3-1 explains that the "effect" of §3(1) "is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized)." 29 C.F.R. § 2510.3-1 (A-74). Accordingly, the DOL has determined that certain severance pay arrangements are severance plans, not pension plans:

> (b) Severance pay plans.
>
> (1) For purposes of Title I of the Act and this chapter, an arrangement shall not be deemed

to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that:

(i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;

(ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and

(iii) All such payments to any employee are completed,

(A) In the case of **an** employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and

(B) In the case of all other employees, within 24 months after the termination of the employee's service.

(2) For purposes of this paragraph (b),

(i) "Annual compensation" means . . .

(ii) "Limited program of terminations" means a program of terminations:

(A) Which, when begun, was scheduled to be completed upon a date certain or upon the

occurrence of one or more specified events;

(B) Under which the number, percentage or class or classes of employees whose services are to be terminated is specified in advance; and

(C) Which is described in a written document which is available to the Secretary upon request, and which contains information sufficient to demonstrate that the conditions set forth in paragraphs (b)(2)(ii)(A) and (B) of this section have been met.

29 C.F.R. §2510.3-2(b) (A-75) (emphasis added).

Here, every criterion for qualifying the ISEP as a severance pay plan is satisfied:

(1) The SEP is not contingent upon the Special Separatee "retiring," but, rather, upon termination of the Special Separatee's employment;[7]

(2) The SEP is capped at 120% of the employee's highest 3-year final average earnings, well under the two-year salary cap;

(3) Each member of the Class received his/her SEP within a few months after separating from GTE (i.e., long before expiration of the 24-month period set forth in the DOL regulation)[8]; and

---

[7] In fact, there are no minimum age or service requirements for the SEP (unlike for Pensions under the Plan).

[8] Given a choice between an annuity and a lump sum, most

(continued...)

(4) The SEP was provided pursuant to a limited program of terminations that (a) was to be completed by a specified date and upon the occurrence of a specified event (separation), (b) identified, in advance, the class of employees whose services are to be terminated, and (c) was described in a written document.

See Article XXII, §22.1 (A-104). Under the DOL's own criteria, the SEP is a severance benefit, not a pension benefit. However, even if the ISEP did not satisfy each of the regulation's criteria, this Court should still find that the SEP is a severance benefit because, as discussed below, respondents' own witnesses testified that the "purpose" of the ISEP was to provide severance payments (in the form of the SEP) to employees who were involuntarily separated, and this testimony was supported by myriad documents.

The testimony of respondents' own witnesses

On cross-examination at trial, Donna Chiffriller, GTE's Executive Director of Benefits Strategy and Design and the Plan Administrator ("PA") for the Plan, testified that GTE offered a severance plan, HR Policy 104, under which GTE paid severance benefits out of its own assets. 4/17/01 TT (A-135, 137). Chiffriller explained that GTE suspended the HR 104 severance benefits solely for Special Separatees who received, instead, the SEP. Id. Significantly, Chiffriller testified that GTE deemed the SEP a "severance program," and that it replaced severance benefits previously available under HR 104. Id. Summary booklets GTE distributed to

---

[8](...continued)
participants will choose the lump sum. See, e.g., Private Pensions, Implications of Conversions to Cash Balance Plans, GAO/HEHS-00-185 (Sept. 29, 2000) (A-94). Here, all members of the Class chose a SEP Lump Sum, and respondents produced no evidence that *any* Special Separatee elected a SEP Annuity.

participants similarly explained that HR 104 severance benefits were suspended for employees who were separated under the ISEP. See PEx. 40 (A-120); PEx. 45 (A-125).

Galgano provided virtually identical testimony, adding that, when GTE implemented the ISEPs, the Plan was over-funded and, therefore, GTE shifted the burden of the HR 104 severance program from the corporation to the Plan because it was "a cost savings" for GTE. 4/18/01 TT (A-139, 140). Galgano further testified that the term Pension, as used in the Plan, does not include the SEP. Id. (A-142). Chiffriller's and Galgano's testimony, unequivocal and forthright, represented the only testimonial evidence relative to the character of the SEP.

The summary booklets describing the SEP

Consistent with Chiffriller's and Glagano's testimony, respondents issued at least ten summary booklets, each describing the SEP as a "separation benefit," "separation amount," "separation calculation," or "severance payment," but never as a pension benefit.[9] Moreover, the summary booklets explain that the SEP was intended to provide a competitive level of "severance payments":

> Three-year average pay is used only to compute the added VSIP lump sum [i.e., SEP Lump Sum] payment. Generally, **the VSIP lump sum amount is intended to be in line with competitive levels of involuntary severance payments.**

PEx. 38 (A-118) (bold added); and PEx. 39 (A-119) (underlined

---

[9] See PEx. 35 (A-115); PEx. 36 (A-116); PEx. 37 (A-117); PEx. 38 (A-118); PEx. 39 (A-119); PEx. 40 (A-120); PEx. 41 (A-121); PEx. 42 (A-122); PEx. 43 (A-123); PEx. 44 (A-134); and PEx. 45 (A-125).

added).[10] In fact, several of the booklets specifically note that, in light of the SEP, Special Separatees will not receive the severance benefit customarily paid under GTE's HR Policy 104 severance program:

> [A]ll other company policies governing separation pay and benefits including HR Policy #104 and enhanced HR Policy #104 are suspended until further notice.

PEx. 40 (A-120); and PEx. 45 (A-125).[11]

The waiver and release agreements

In 1997, GTE added another ISEP to the Plan via Article XXVII. PEx. 12 (A-113). Article XXVII conditioned receipt of the SEP on the Special Separatee signing a "Separation Agreement and General Release," waiving all claims against GTE relating to the Separatee's employment or termination thereof. Id. As explained in Article XXVII and in summary booklets, failure to execute the release meant the Special Separatee would receive only 50% of the SEP. Id.; and PEx. 14 (A-114); PEx. 37 (A-117); PEx. 44 (A-124).

Although waiver and release agreements are common with respect to severance benefits,[12] they are unlawful with respect to accrued pension benefits. Pursuant to ERISA

---

[10] See also PEx. 37 (A-117) (explaining that the minimum separation benefit for executives is the greater of the ISEP or Executive Severance Minimum") (emphasis added).

[11] The PEx. 45 booklet was issued in connection with ISEP benefits provided under the Salaried Employees Retirement System of GTE Hawaiian Telephone Company, a GTE sponsored plan that merged into the Plan on December 31, 1995. See PEx. 9 (A-113).

[12] See, e.g. Loskill v. Barnett Banks, Inc. Sev. Pay Plan, 289 F.3d 734 (11th Cir. 2002).

§203(a)(2)(A), commonly referred to as the anti-forfeiture rule, participants in defined benefit plans possess a nonforfeitable right to their accrued pension benefit once they complete the plan's service requirements for vesting. 29 U.S.C. §1053(a)(2)(A) (A-66). TR 1.411(a)-4, made applicable to ERISA §203(a), explains that (1) a nonforfeitable right to an accrued benefit is an unconditional right;[13] and (2) adjustments to accrued benefits that exceed reasonable actuarial reductions can result in an impermissible forfeiture of accrued benefits. 26 C.F.R. §1.411(a)-4 (A-78).

If the SEP *were* an accrued benefit, the waiver and release condition would obviously violate these anti-forfeiture rules. The same holds true for the 50% reduction provision because it applies irrespective of the Special Separatee's age, anticipated mortality, or applicable discount rate, and therefore is not a reasonable actuarial reduction. Of course, if the SEP is not an accrued benefit, these provisions do not violate the anti-forfeiture rules, which apply solely to accrued pension benefits. The fact that the provisions applied solely to the SEP, and not the DVP, confirms that the SEP was never intended to be a pension benefit. Rather, as respondents' own witnesses testified, the ISEP was intended to be a severance program and the SEP was intended to be a severance benefit.

Petitioners' termination documents

Petitioners' termination documents are equally telling. The termination letter to Conine advised that Conine would be "eligible for severance benefits under GTE's Involuntary Separation Program (ISP)." PEx. 90 (A-133) (emphasis added). GTE's termination letter to Bowles similarly stated that Bowles would be eligible for "separation benefits . . . as set forth in the Involuntary Separation Program [ISEP]." DEx. 28 (A-134) (emphasis added). Bowles' application for ISEP benefits (on

---

[13] See also ERISA §3(19), 29 U.S.C. §1002(19) (A-65) (substantially the same).

a form prepared by GTE) expressly describes the SEP as a "separation payment." PEx. 50 (A-126). GTE also issued a statement that specifically identified Bowles' SEP Lump Sum as a "Severance" and her DVP lump sum as a "Pension":

12. Type of Payment (if yes above) **1. Severance** 2. Vacation 3. Holiday 4. Other		13. Last Date Covered by Payment 05 31 93	
Type	No. of Hours/Days Covered	Amount	Dates Covered
2	15 Days	$3,000.00	Lump Sum
1	**Separation**	**$28,248.68**	**Lump Sum**
4	Pension	$18,143.78	Lump Sum

* * *

PEx. 51 (A-127).[14] Obviously, if Bowles' SEP Lump Sum was an accrued pension benefit, respondents would have identified it as a Pension, too--not a Severance. Given the foregoing evidence, including the Article XXII provision that expressly states that the SEP is not an accrued benefit, the District Court correctly ruled that the SEP was intended to be a severance benefit and was not an accrued pension benefit (A-4, 15, 22-25).

III. Review Is Warranted Because the Eleventh Circuit's Decision Is in Direct Conflict With This Court's Rulings in Hughes, Lockheed, Shaw, and Alessi.

ERISA neither requires that employers establish employee benefit plans, nor mandates the types and levels of

---

[14] Chiffriller testified that she believed this document was provided to Bowles to support her application for unemployment compensation. 4/17/01 TT (A-136).

benefits that must be provided under an employee benefit plan. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 443 (1999); Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996) (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983), and Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511 (1981)). Consequently, this Court has long held that the types and level of benefits provided under an employee benefit plan are within the discretion of the sponsoring employer. Id. The only caveat to this benefit flexibility is that, if an employer chooses to provide a pension benefit to its employees, it must satisfy ERISA's minimum vesting and accrual rules, and the pension benefit may not be forfeited once the participant is vested. Alessi, 451 U.S. at 512-513. Subject to these restrictions, ERISA permits the level of pension benefits and the formula for determining pension accruals to vary from plan to plan. Id.

Given the voluntary nature of employee benefit plans, ERISA explicitly recognizes that a plan, fund, or program established or maintained by an employer for the purpose of providing benefits to the employer's employees may be a pension plan, a welfare plan, or both, depending on the "purpose" for which it was established or maintained. For example, ERISA §3(1) deems an employee benefit plan a welfare benefit plan "to the extent" its "purpose" is to provide welfare benefits, such as severance benefits. 29 U.S.C. §1002(1) (A-64) (incorporating benefits described in 29 U.S.C. §186(c) (A-61)). By contrast, an employee benefit plan is a pension plan "to the extent" that, by its "express terms or as a result of surrounding circumstances," it "provides retirement income to employees." 29 U.S.C. §1002(2)(A) (A-64). In light of the limiting language in both of these definitions, ERISA §3(3) explains that an employee benefit plan may be both a pension plan and welfare plan. 29 U.S.C. §1002(3) (A-65). Although respondents availed themselves of these rules and this Court's holdings in Hughes, Lockheed, Shaw, and Alessi (i.e., that employers may choose the types and level of benefits to provide in their employee benefit plans), the Eleventh Circuit effectively rejected Congressional intent and this Court's holdings by deeming the SEP to be an accrued pension benefit,

even though the Plan expressly states that the SEP is not an accrued benefit.

IV. Review Is Warranted Because the Eleventh Circuit Applied a Flawed Legal Analysis and, in Addition, Misapprehended the Undisputed Facts.

The Eleventh Circuit framed the issue before it as follows:

> [W]hether the district court, through a magistrate judge, erred when it found that the plan administrator of GTE's pension plans properly interpreted the terms of the Plan but that the Plan, as so interpreted, violated ERISA §205(g).

Opinion (A-46). The only Plan provision the District Court found the PA *had* properly interpreted was a provision pertaining to the interest rate for computing lump sum distributions. Order (A-12, 13). Although that finding was relevant to Count III (breach of the terms of the Plans), it has *no bearing whatsoever* on Count II (the Count at issue here), which is based on the requirements of ERISA §205(g). As importantly, that finding did not in any way relate to the question of whether the SEP is a severance or pension benefit.

As support for its conclusion that the SEP was an accrued pension benefit, the Panel cited Lyons for its explanation that the normal retirement benefit (NRB) is "the amount the participant would have received at age 65 but for an election to take an early lump sum benefit." Lyons, 221 F.3d at 1252. In Lyons, however, there was no separation program or separation benefit. Therefore, Lyons never suggested (via its explanation of the NRB or otherwise) an analysis for determining whether a benefit is a pension or severance.

The Panel also deemed relevant the following features of the ISEP: (1) the NRB was "enhanced" by the SEP Annuity; (2) Special Separatees could elect to take their pension

immediately, rather than wait until age 65; and (3) Special Separatees could elect to receive their ISEP benefits in an annuity or lump sum form. Opinion (A-50-52). These features, while interesting, do not alter the fact that the undisputed "purpose" of the ISEP was to provide severance benefits to Special Separatees, and that Article XXII expressly states that the SEP is not an accrued benefit.

Further, the Panel accepted respondents' argument that the ISEP provided a "significant subsidy" to Special Separatees who elected to take their benefits immediately. Even if this were true [it is not; see Part V, below], it is irrelevant because the "purpose" of the ISEP was to provide severance benefits to Special Separatees.

Lastly, the Panel erroneously found that respondents offered "uncontroverted" evidence that the PA had always interpreted the provision enhancing the DVP with a SEP as creating a single accrued NRB for Special Separatees. Opinion (A-52). However, petitioners have repeatedly argued that the administrative denial letter, *itself*, explains that the DVP and SEP were treated as two separate benefits:

> In calculating the amount of each claimant's lump-sum distribution, GTE first determined the Deferred Vested Pension payable on her respective pension payment date by applying Plan factors which are based on the PBGC's immediate interest rate, rather than the deferred interest rate; then, it converted this annuity to a lump-sum amount; and, finally, it added the lump-sum amount for the immediately payable Deferred Vested Pension to the SEP Lump Sum.

PEx. 55 (A-128). Petitioners' appeal briefs also cited Chiffriller's testimony that the Pension and SEP were computed separately and under different formulas. 4/17/01 TT (A-113-114). It clearly was not the case that the PA treated the DVP and SEP as a single accrued benefit, or that petitioners

did not contest respondents' argument to the contrary.[15]

---

[15] Respondents' authority is equally unavailing. Respondents' cited IRS Notice 2003-10, Rev. Rul. 92-66, Code §412(l)(7)(B), and TR 1.401(a)(4)-3(f)(5) for the proposition that contingent-event benefits similar to the SEP (e.g., plant shut-down benefits) are accrued benefits. Notice 2003-10 (A-81) only seeks comments on this issue. Code §412(l)(7)(B) (A-72) merely deems contingent-event benefits to be plan "liabilities." Rev. Rul. 92-66 (A-88) concerns a benefit that was indisputably a retirement benefit, as it was provided to separatees who had attained age 55 and was identical to the regular pension benefit. TR 1.401(a)(4)-3(f)(5) (A-77) explains that, if a contingent-event benefit is provided to employees who are involuntarily terminated from employment within a specified period, it will be "treated as" an early retirement benefit *for purposes of determining compliance with Code §401(a)(4)*, which prohibits plans from discriminating in favor of highly compensated employees. Thus, the sole purpose of the regulation is to ensure that contingent-event benefits are available on a non-discriminatory basis. A more relevant non-discrimination rule is TR 1.401(a)(4)-4(e)(2) (A-78), which defines the term "ancillary benefit" to include "shut-down benefits not protected under [Code] section 411(d)(6), and other similar benefits." This definition implicitly recognizes that a shut-down or other similar benefit may be an ancillary benefit, and not an accrued benefit, early retirement benefit or retirement-type subsidy (the benefits "protected" under Code §411(d)(6) (A-71)).

Bellas v. CBS, Inc., 221 F.3d 517 (3rd Cir. 2000); Harms v. Cavenham Forest Industs. Inc., 984 F.2d 686 (5th Cir. 1993); Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union, 980 F.2d 465 (7th Cir. 1992); Shaw v. International Assoc. of Machinists & Aerospace Workers Pen. Plan., 750 F.2d 1458 (9th Cir. 1985); and Kohl v. Association of Trial Lawyers of America, 183 F.R.D. 475 (D.Md. 1998), cited by respondents, are also inapposite. None of the plans stated that the disputed benefit was not an accrued benefit, and no evidence was presented that the disputed benefit was intended to be a severance benefit. Moreover, in Bellas and Harms, the contingent-event benefit was provided to participants who were at or near early retirement age and/or who had long years of service-factors typically associated with retirement. Hickey, Shaw, and Kohl did not

(continued...)

Given the foregoing evidence, including the Article XXII provision that expressly states that the SEP is not an accrued benefit, the District Court found that the purpose of the ISEP was to provide severance benefits, and that the SEP was intended to be a severance benefit. Order (A-4, 15, 22-25). As these factual findings were not clearly erroneous, the Eleventh Circuit should have affirmed the District Court's holding that the SEP was a severance benefit, not an accrued benefit, and that respondents should have excluded it from their ERISA §205(g) compliance analysis. Indeed, the Eleventh Circuit should have affirmed based on its *own* finding that the SEP "was a sort of severance package." Opinion (A-47).

V. *Regarding the Conditional Question Presented,* Review Is Warranted Because Accrued Benefits Must Comply with ERISA's Actuarial Equivalence Rule, But When Respondents Performed Their ERISA §205(g)(3) Compliance Analysis, They Converted Petitioners' SEP Lump Sum Into an Annuity That Was Worth Only One-Third That Amount.

Petitioners were ages 40 and 45 when they received their SEP. In their ERISA §205(g)(3) compliance analysis, respondents computed an age-65 DVP annuity and an age-65 SEP Annuity, added these annuities together, and then discounted to present value using the PBGC immediate rate and lesser deferred rates. The resultant amount was less than petitioners' aggregate lump sum (i.e., DVP lump sum + SEP Lump Sum). Respondents argued, and the Panel agreed, that petitioners received more than the statutory minimum. This conclusion was erroneous because the age-65 SEP Annuity

---

[15](...continued)
concern a contingent-event benefit at all. They concerned a cost-of-living-adjustment feature *that was part of the plan's stated formula for computing the accrued benefit.* The situation here is just the opposite, as the Plan expressly states that the SEP is not an accrued benefit.

respondents' computed was not actuarially equivalent to petitioners' *immediate* SEP Lump Sum. As respondents conceded, it was actuarially equivalent to that amount *as if it were paid at age 65*, decades after petitioners elected to receive the immediately payable SEP Lump Sum:

> Mr. Young [respondents' non-expert actuary] derived the SEP Annuity commencing at age 65 that would be worth $28,248.68 [Bowles' immediate SEP Lump Sum] *at age 65*.

Respondents' Trial Brief (A-147) (emphasis in original). Thus, in computing the age-65 SEP Annuity, respondents effectively ignored the time value of money for 20 and 25 years! This violated both the terms of the Plan and ERISA §204(c)(3), commonly known as the actuarial equivalence rule.

As defined in Article XXII, the SEP Annuity is an annuity that is actuarially equivalent to the Special Separatee's "immediate" SEP Lump Sum as of the Special Separatee's "actual" age:

> "SEP Annuity" means an annuity that is the actuarial equivalent of the SEP Lump Sum. For purposes of determining the SEP Annuity, actuarial equivalence shall be determined by using the Special Separatee's <u>actual</u> age . . . and whichever factors specified in Section 22.8(c)(I) would provide the greater lump sum if an annuity were being converted to an actuarially equivalent <u>immediate</u> lump sum payment. . . .

Article XXII at §22.2(m) (A-105) (emphasis added). Consequently, the age-65 SEP Annuity respondents computed for their ERISA §205(g)(3) compliance analysis should have been actuarially equivalent to petitioners' "immediate" SEP Lump Sum as of petitioners' "actual" ages of 40 and 45. Respondents disagreed, contending that, if petitioners had waited until age 65 to take their ISEP benefits and elected

annuities, the SEP Annuity would be derived from the SEP Lump Sum payable at age 65, which, according to respondents, would be the same dollar amount as petitioners' immediate SEP Lump Sum. On this last point, respondents reasoned that the SEP Lump Sum is a fixed amount that never changes.

Although the SEP Lump Sum is a fixed amount, it is not the amount that is payable under Article XXII if the Special Separatee elects to receive his/her ISEP benefits in a lump sum form. Indeed, Article XXII nowhere states that, if the Special Separatee elects a lump sum form of distribution, he/she will receive a SEP Lump Sum in lieu of the SEP Annuity. Rather, Article XXII very clearly states that, if a DVP-eligible Special Separatee elects a lump sum, he/she will receive the "actuarial equivalent" of (1) his/her DVP plus (2) the SEP Annuity. Article XXII, §22.8(c)(i) (A-111). Thus, if a Special Separatee elects a lump sum, he/she is entitled to the "actuarial equivalent" of the SEP Annuity.

Of course, since the SEP Annuity must, by definition, be actuarially equivalent to an immediate SEP Lump Sum as of the Special Separatee's "actual" age, if a Special Separatee elects an immediate lump sum distribution of his/her ISEP benefits, the "actuarial equivalent" of the SEP Annuity will necessarily equal the immediate SEP Lump Sum. Because petitioners elected an immediate lump sum distribution of their ISEP benefits, the actuarial equivalent of their SEP Annuity *was* the immediate SEP Lump Sum.

Any doubt that Article XXII intended the SEP Annuity to always be actuarially equivalent to the immediate SEP Lump Sum (rather than this same lump sum paid at age 65) is readily dispelled when one considers a letter Chiffriller wrote to James Berger, another ISEP Separatee:

> The other part of the benefit is an additional amount payable from the qualified pension plan under the special amendment to the plan providing for the Involuntary Separation Program (ISEP). The benefit is calculated at termination and is expressed as a lump sum

> amount. . . .
>
> * * *
>
> The ISEP single-life annuity is based on the amount of money you could withdraw on a monthly basis over your lifetime if you received the lump sum and invested it. . . .
>
> * * *

PEx. 79 (A-131) (emphasis added). In Chiffriller's own words, the SEP Lump Sum was to be calculated as of the date the Special Separatee terminated employment (i.e., "immediately," as of the Special Separatee's "actual" age), and any SEP Annuity derived from that amount must take into account the time value of money. In view of Chiffriller's letter and the plain language of Article XXII, the Panel erred when it concluded that the immediate SEP was a subsidy on the SEP payable at age 65. Opinion (A-52, 53, 55). As the IRS has explained: "When one form of benefit has a greater actuarial value than another form, the difference in value is often called a subsidy." IRS Notice 97-11 (A-87) (emphasis added). Pursuant to Article XXII, §22.2(m) (A-105), the SEP Annuity must always be actuarially equivalent to the immediate SEP Lump Sum. Therefore, it cannot be the case that the immediate SEP is subsidy on the SEP payable at age 65.

Even if the Plan could be interpreted in the manner advocated by respondents and adopted by the Panel, however, that interpretation would not pass muster under ERISA §204(c)(3). Under that statute, if an accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age [e.g., petitioners' immediate SEP Lump Sum], the legally accrued benefit is an annuity commencing at normal retirement age that is actuarially equivalent to that amount:

> [I]n the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age . . . the employee's accrued benefit . . . shall be the

actuarial equivalent of such benefit or amount.

29 U.S.C. §1054(c)(3) (A-67). In fact, ERISA's definition of accrued benefit expressly incorporates this rule, as does TR 1.417(e)-1(d) which enforces ERISA §205(g)(3), albeit by reference to Code §411(c)(3) (A-70), the Code analogue to ERISA §204(c)(3). 29 U.S.C. §1002(23)(A-66); 26 C.F.R. §1.417(e)-1(d) (A-80). When respondents performed their ERISA§205(g)(3) compliance analysis, they should have computed a SEP Annuity that was actuarially equivalent to petitioners' immediate SEP Lump Sum. As acknowledged by their own expert, actuary Vincent Amoroso, they did not do so.

Amoroso testified that (1) the SEP Annuity respondents' calculated was worth only one-third the amount of petitioners' immediate SEP Lump Sum; (2) using respondent's assumptions, the present value of the SEP Annuity was "quite a bit smaller than $18,000" [Conine's immediate SEP Lump Sum]; and (3) if the Plans require the SEP Annuity to be actuarially equivalent to the immediate SEP Lump Sum, the SEP Annuity he calculated for Conine would have been "much larger." 4/19/01 TT (A-143-145, 147).[16] Concurring, petitioners' expert, actuary Charles Monroe, testified that (1) the SEP Annuity respondents calculated for Bowles had a present value of only $9,032!--not $28,248.68 [Bowles' immediate SEP Lump Sum]; and (2) an actuarially equivalent age-65 SEP Annuity would be triple the amount of the age-65 SEP Annuity respondents calculated for their ERISA §205(g)(3) compliance test. 4/17/01 TT (A-137-138).

In short, even if the SEP *were* an accrued benefit, it was undisputed that the SEP Annuity respondents calculated for their ERISA §205(g)(3) compliance analysis was not actuarially

---

[16] Amoroso also testified that (1) if the Code §417(e) minimum [i.e., ERISA §205(g)(3) minimum] were tested against solely the DVP, "more money would have to be paid", and (2) the additional amount payable to Conine would be approximately $7,000. 4/19/01 TT (A-146).

equivalent to petitioners' immediate SEP Lump Sum, as required under ERISA §204(c)(3) and Article XXII of the Plan. For this additional reason, the Panel should have affirmed, not reversed, the District Court's judgment for petitioners on Count II of the Complaint (Violation of ERISA §205(g)(3)).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that their Petition be granted.

Respectfully submitted,

Bradley J. Schram
Robert P. Geller
Eva T. Cantarella *
Hertz, Schram & Saretsky, P.C.
1760 S. Telegraph Rd., Ste. 300
Bloomfield Hills, MI 48302
(248) 335-5000

Allen Engerman
Law Offices of
Allen C. Engerman, Ltd.
666 Dundee Rd., Ste. 1200
Northbrook, Ill. 60062
(847) 564-5555

Counsel for Petitioners

December 6, 2004

* Counsel of Record

APPENDIX

TABLE OF CONTENTS TO APPENDIX

District Court Decisions

Order, Granting Summary Judgment to Plaintiffs' on Count II (Violation of ERISA §205(g)(3)) (filed 10/29/01) (unpub.) A-1

Order, Granting Plaintiffs' Motion for Class Damages and Prejudgment Interest (filed 5/06/02) (unpub.) A-28

Order, Clarifying and Reaffirming Court's Earlier Award of Prejudgment Interest (filed 7/22/02) (unpub.) A-36

Order and Final Judgment (filed 9/11/02) (unpub.) A-38

Eleventh Circuit Decisions

Opinion, Reversing Judgment for Plaintiffs, 2004 WL 392918 (11th Cir. Feb. 3, 2004) (unpub.) A-45

Judgment Respecting the Opinion (Feb. 3, 2004) (unpub.) A-57

Order Denying Plaintiffs' Petition for Rehearing En Banc (filed Sept. 8, 2004) (unpub.) A-59

Labor Statutes Incorporated in ERISA

29 U.S.C. §186(c) A-61

ERISA Statutes

29 U.S.C. §1001 [ERISA §2] A-62

29 U.S.C. §1002(1) [ERISA §3(a)] A-64

29 U.S.C. §1002(2) [ERISA §3(2)] A-64

29 U.S.C. §1002(3) [ERISA §3(3)] A-65

29 U.S.C. §1002(19) [ERISA §3(19)] A-65

29 U.S.C. §1002(23) [ERISA § 3(23)] A-66

29 U.S.C. §1053(a)(1)-(2) [ERISA §203(a)(1)-(2)] A-66

29 U.S.C. §1054(c)(3) [ERISA §204(c)(3)] A-67

29 U.S.C. §1055(g) [ERISA §205(g)] A-68

29 U.S.C. §1132 [ERISA §502] A-69

Internal Revenue Code Statutes

26 U.S.C. §401(a)(4) A-70

26 U.S.C. §411(c)(1)-(3) A-70

26 U.S.C. §411(d)(6) A-71

26 U.S.C. §412(l)(7) A-72

26 U.S.C. §417(e)(3) A-73

Department of Labor Regulations

29 C.F.R. §2510.3-1(a)(3) A-74

29 C.F.R. §2510.3-2(b) A-75

Treasury Regulations

26 C.F.R. §1.401(a)(4)-3(f)(5) A-77

26 C.F.R. §1.401(a)(4)-4(e)(2) A-78

26 C.F.R. §1.411(a)-4 ..... A-78

26 C.F.R. §1.411(a)-7(a) A-79

26 C.F.R. §1.411(a)-7(c) A-79

26 C.F.R. §417(e)-1(d) A-80

Other Treasury/IRS Authority

IRS Notice 2003-10
2003-5 I.R.B. 369; 2003 WL 77005 (Feb. 3, 2003) A-81

IRS Notice 97-11
1997-1 C.B. 379; 1197-2 I.R.B.
1996 WL 747904 (Jan. 13, 1997) A-87

Revenue Ruling 92-66
1992-36 I.R.B. 11; 1992 WL 200296 (Aug. 20, 1992) A-88

Legislative History

H.R. Rep. No. 93-807,
1974 U.S.C.C.A.N. 4639 (Feb. 21, 1974) A-93

H.R. Conf. Rep. No. 93-1280,
1974 U.S.C.C.A.N. (Aug. 12, 1974) A-93

Other Authoritative Materials

Private Pensions, Implications of Conversions
to Cash Balance Plans
GAO/HEHS-00-185 (Sept. 29, 2000) A-94

Plaintiffs' (Petitioners') Trial Exhibits

PEx. 1A–Service Plan A-95

PEx. 1B–Article XXII of the Service Plan A-104

PEx. 5–GTE Service Corporation, Unanimous
Consent of Board of Directors (6/01/95) A-112

PEx. 9--Second Amendment to the Service Plan A-113

PEx. 12–1997 ISEP for the Service Plan A-113

PEx. 14–1998 ISEP for the Service Plan A-114

PEx. 19B–Article XXXIII of the TelOps Plan A-114

PEx. 27–GTE Hawaiian Telephone Company
Incorporated, Unanimous Consent to Corporate
Action Without a Meeting of the Board of Directors .. A-115

PEx. 35–ISEP Booklet (June 1, 1993) A-115

PEx. 36–ISEP Booklet (Jan. 1, 1996) A-116

PEx. 37–ISEP Booklet (1998) A-117

PEx. 38–VSIP Booklet (Mar. 15, 1993) A-118

PEx. 39–VSIP Booklet (no date) A-119

PEx. 40–ISEP Booklet (Oct. 12, 1993) A-120

PEx. 41–ISEP Booklet (Jan. 25, 1994) A-121

PEx. 42--ISEP Booklet (1995) A-122

PEx. 43–ISEP Booklet (1996) A-123

PEx. 44–ISEP Booklet (1998) A-124

PEx. 45–ISEP Booklet (1995) A-125

PEx. 49–EERP/ISEP Checklist A-126

PEx. 50–Application for Commencement of Separation Program Benefits A-126

PEx. 51–Bowles' Separation Statement A-127

PEx. 55–7/24/97 Letter from GTE Denying Plaintiffs' (Petitioners') Claims A-128

PEx. 65–Personalized Benefits Statement for James L. Berger A-128

PEx. 67–[Revised] Personalized Benefits Statement for James L. Berger A-129

PEx. 68–[Revised] Personalized Benefits Statement for James L. Berger A-129

PEx. 69–[Revised] Personalized Benefits Statement for James L. Berger A-129

PEx. 70–[Revised] Personalized Benefits Statement for James L. Berger A-130

PEx. 75–ISEP Benefits Statement for James L. Berger . A-130

PEx. 79–4/5/96 Letter from Donna Chiffriller, GTE's Director of Benefit Plans, to James L. Berger ... A-131

PEx. 85–GTE Internal Memoranda A-132

PEx. 90–10/17/95 Letter from GTE to Conine A-133

Defendants' (Respondents') Trial Exhibits

DEx. 28–4/20/93 Letter from GTE to Bowles A-134

Trial Transcripts

4/17/01 Trial Transcript A-135

4/18/01 Trial Transcript A-139

4/19/01 Trial Transcript A-143

Defendants' (Respondents') Trial Brief A-147

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
01OCT30 AM
8:45
CLERK OF THE
COURT
MIDDLE DISTRICT
OF
FLORIDA
TAMPA, FLORIDA

SHEILA WIMBUSH-BOWLES, and BETTY CONINE, individually and on behalf of all others similarly situated,

Plaintiffs,

(v) Case No: 8:98-cv-598-T-MSS

GTE SERVICE CORPORATION PLAN FOR EMPLOYEES' PENSION, et al.,

Defendants.

ORDER

This matter, between GTE and a class of employees involuntarily separated from GTE, arises out of a dispute over GTE's calculation of benefits due to them at the time of their involuntary separation. Plaintiffs are former employees of GTE affiliates. Plaintiffs separated from GTE's employ under two different employee benefits plans that characteristically are the same for purposes of this decision. Upon their separation and at their election, each Plaintiff received a lump sum distribution.

Plaintiffs challenge these payments as inadequate on two grounds. First, Plaintiffs contend that GTE erred in its

interpretation of the Plan to allow the "PBGC[1] immediate interest" rate to be applied rather than the "PBGC immediate and deferred" rates when calculating benefits available to the class employees.

Plaintiffs also contend that they were underpaid because GTE improperly combined their separation package with their deferred vested pension when it conducted its analysis of whether the plan met the minimum payout standards set forth in the Employment Retirement Income Security Act of 1974 ("ERISA"). Specifically, Plaintiffs assert that under the terms of the benefit plans, the deferred vested pension or "DVP" is the sole "accrued benefit" or only "normal retirement benefit" as defined by law. Plaintiffs argue therefore that only the DVP portion could properly have been considered in an ERISA compliance analysis.

GTE responds that its use of the PBGC rate rather than immediate and deferred rates was within the sound discretion of the plan administrator and cannot be overturned because it cannot be found to be arbitrary and capricious. Further, GTE avers that the "severance package" and deferred vested pensions are two components of the same "normal retirement benefit" and were, therefore, properly combined to test compliance with ERISA. Tested as a combined single benefit, the payment, GTE asserts, met ERISA minimum payout requirements.

The Court has reviewed the parties' submissions, the evidence and testimony presented at trial, as well as the designated exhibits. For the reasons that follow, the Undersigned finds that Plaintiffs should prevail on their challenge to the distribution under the Plan as violative of ERISA but that the plan administrator's application of the PBGC rates was not arbitrary and capricious. Pursuant to Fed. R. Civ. P. 52, the Court makes the following findings of fact and conclusions of law.

---

[1]"PBGC" is the acronym for Pension Benefit Guaranty Corporation.

Findings of Fact

In 1986, Plan sponsors of the GTE Corporation, now known as Verizon, had in place a system of severance benefits paid to employees involuntarily separated from the company for reasons other than cause. This program, called the Enhanced Early Retirement Program ("EERP"), was triggered by instances such as layoffs, reductions in force, plant shut down, and the like. The payments under this program did not necessarily affect an employee's pension benefits. However, the pension benefits for displaced employees were not available in a lump sum upon separation but were typically paid out in the normal course upon the occurrence of events under the pension plan with reference to certain age and years of service requirements with the company. This pension was paid out of a qualified plan and severance benefits were paid by the company outside the plan.

In 1992, a new system was developed pursuant to which those persons involuntarily separated for reasons other than cause were dubbed "special separatees" and were paid any benefits to which they were then entitled out of the qualified plan. This new program was called the Qualified Involuntary Separation Program ("ISEP"). One portion of the benefit was related to the event of involuntary separation, and it was referred to in these proceedings as the SEP portion of the plan. The other part was the employee deferred vested pension, or DVP.

Many added benefits were thought to be provided to special separatees under this system. First, they would be paid a separation benefit as part of the termination process. Additionally, the special separatee would be entitled to a pension benefit that wold be tied to the separation benefit. The two were tied together in the sense that however the employees elected to receive the separation benefit they would be required to take the pension benefit. Thus, if elected as a lump sum the entire payment would be in lump sum form, thereby accelerating the time that a typical pension-only benefit could be received. If taken in an annuity or stream of

payments, both components would be taken as a annuity. Because these severance type benefits were so closely tied to the pension type benefit, employees were advised that any payment under the plan could be rolled over into an IRA and, thus, treated as retirement. Expecting that many would opt for a lump sum benefit, the value of plan benefits was also designed to cover any tax penalty that might be imposed on the early withdrawal of "pension benefits." So in many, indeed most, respects each component of the package bore all of the characteristics of a "normal retirement benefit."

In one crucial respect, however, the separation component of the benefits package differed. For the reasons set forth in the analysis that follows, the severance part of the package was not an accrued benefit as a matter of fact or law. First, the plan expressly states that the SEP is not an accrued benefit. See GTE Service Plan, Article XXII, §22.8(a). Second, as the Defendant's plan administrator testified, the separatee had no right in the benefit prior to termination as a special separatee. Thus, if GTE decided at its sole option to discontinue payment of the separation portion of the program as formulated at any time prior to actual separation of the employee, the severance portion of the plan could be withdrawn without recourse to the employee. The severance component would not be payable at age 65, on the date of separation, or at any time or in any other form because it would not be payable at all.

Sheila Wimbush-Bowles ("Bowles"), a former employee of GTE Service Corporation, was discharged on June 21, 1993, as part of a reduction in force. Therefore, Bowles qualified as a "Special Separatee" under Article XXII of the Service Plan. It was only then and no time before that her interest in the SEP became vested. At the time of her discharge, Bowles had attained age 40 years and 5 months and had completed 14.4167 years of accredited service under the GTE Service Corporation Plan for Employees' Pensions ("Service Plan"), and was entitled to a DVP under the Service Plan.

Betty Conine ("Conine"), a former employee of GTE

Florida Inc., was discharged on November 16, 1995. Therefore, Ms. Conine also qualified as a "Special Separatee" under Article XXXIII of the TelOps Plan. As with Ms. Bowles, she too was terminated as part of a reduction in force. It was only then and no time before that her interest in the SEP also became vested. At the time of her discharge, Conine had attained age 45 years and 7 months and had completed 14.86057 years of accredited service under the GTE Telephone Operations Salaried Pension Plan ("TelOps Plan"), and was entitled to a DVP under the TelOps Plan.

The Service Plan and TelOps Plan (collectively, the "Plans") are "defined benefit plans" within the meaning of ERISA §3(35), 29 U.S.C. §1002(35). "Normal retirement age" under the Plan is age 65. Under the Plans, a terminated employee with at least 5 years of accredited service is entitled to receive a DVP, an annuity commencing at age 65. The Plans define the normal form of benefit as a life annuity commencing on the first day of the next month following the participant's normal retirement age. The Plans provide that the accrued benefit for any participant at any time is the annuity computed in accordance with §6.1 of the Plans. As will be discussed in greater detail below, neither the SEP Annuity nor SEP lump sum is an "accrued benefit." Both the Plan language and the testimony of the plan administrator made that clear.

The plan administrator calculated Bowles' DVP benefit at $18,143.78. Because she elected to take the sum as an immediate lump sum, the administrator reduced the DVP to present value, which was computed using a discount rate of 5 percent, the PBGC immediate rate in effect in April 1993. Her SEP Lump Sum was $28,248.68 for a total lump sum distribution of $46,392.46. The PBGC deferred interest rates in effect in April 1993 were 4.25% and 4.0%. Had the administrator chosen the lower rate of anticipated return a larger DVP lump sum would have been calculated.

In the same manner as Bowles, the plan administrator computed Conine's DVP benefit at $17,011.67. This present value was computed using a discount rate of 5 percent, which

was the PBGC immediate rate in September 1995. Conine's SEP lump sum was $18,041.95. Her total lump sum distribution from the TelOps Plan was $35,053.62. The PBGC immediate rate in effect in September 1995 was 5%. The PBGC deferred interest rates in effect in September 1995 were 4.25% and 4.0%. Again, had the administrator chosen the lower rate of anticipated return a larger DVP lump sum would have been calculated for Ms. Conine as well.

As previously noted, in 1997, Bowles and Conine each lodged claims and appeals with Defendants, alleging that their lump sum distributions were incorrectly calculated. The GTE Claims Review Committee denied their appeals.

If Defendants had calculated the benefit as Plaintiffs contend they should have, Bowles would have received a $25,000 DVP lump sum plus her SEP lump sum of $28,248.68. Thus, Bowles would have received a total distribution of $53,248.68 following her involuntary separation from the company. Similarly, Conine contends she would have received a $23,583.04 DVP lump sum plus her SEP lump sum of $18,041.95. For Conine this would have meant a total distribution of $41,624.99 following her involuntary separation from the company. Bowles therefore contends she was underpaid by $6,856.22 and Conine by $6,571.37.[2]

The Plaintiffs estimate that the class as a whole would have been underpaid approximately 50 million dollars. Though this number seems large in the abstract, counsel agree that the over funded plan would not be materially affected by the additional payment and no evidence to the contrary was adduced at trial. Additionally, when asked by Plaintiffs' counsel if she knew whether the GTE plan was over funded by several billion dollars at the time she was reviewing Plaintiffs

---

[2] Although the parties do no agree on the manner Plaintiffs' benefits should be calculated, they agree that there would be a difference in benefit payout under Plaintiffs' proposed scenario. On stipulation, the actual difference owed to Plaintiffs' will be addressed in a separate damages trial.

claim, Donna Chiffriller replied: "It is very well funded. I couldn't tell you the exact amount. But, yes, it is very, very well funded." Trial Transcript, April 17, 2001, at p. 115. Plaintiffs' counsel further asked Ms. Chiffriller: "Would you agree that if the court determines that an award is appropriate that the amount of money being sought does not materially impact the plan from a financial standpoint?" Ms. Chiffriller responded: "I don't believe it would be a material impact." Trial Transcript, April 17, 2001, at p. 115-116.

Conclusions of Law

This Court has jurisdiction over the parties and subject matter of this action and the parties which is based on federal question. See 28 U.S.C. § 1131. Venue is proper in this Court.

I. WHETHER THE PLAN ADMINISTRATOR'S ANALYSIS WAS REASONABLE OR ARBITRARY AND CAPRICIOUS

The Court has previously determined that if a plan grants the plan administrator discretion to interpret the terms of the plan, the standard of review challenging that interpretation is arbitrary and capricious (Dkt. 99). Plaintiffs contend that the plan administrator acted arbitrarily and capriciously because the method employed controverted allegedly plan language under the plan, was contrary to other published information and the administrators lacked consistency in computing lump sum benefits and in interpreting the Articles that created the SEP benefits.

Under the arbitrary and capricious standard, the Court considers whether the challenged interpretation of a plan was made rationally and in good faith and not whether the interpretation was correct. Cagle v. Bruner, 112 F.3d 1510, 1517 (11th Cir. 1997). If an interpretation is supported by a rational basis, the Court may not disturb it, even if it does not agree with the decision or if the interpretation is not one the Court would have made. Id.; Dyce v. Salaried Employees'

Pension Plan of Allied Corp., 15 F.3d 163, 166 (11th Cir. 1994).

In conducting a review of a plan administrator's decision under the arbitrary and capricious standard of review, the court must first determine whether the plan administrator's interpretation is "wrong" and whether the claimant's rival interpretation is reasonable. HCA Health Services of Georgia, Inc. v. Employers Health Insurance Co., 240 F.3d 982, 993-94 (11th Cir. 2001); Brown v. Blue Cross & Blue Shield of Ala., 898 F.2d 1556, 1570 (11th Cir. 1990). If a *de novo* review reveals the plan administrator's interpretation to be "correct," the inquiry ends and the plan administrator's benefits determination is upheld. Adams v. Thiokol Corp., 231 F.3d 837, 843 (11th Cir. 2000). If, however, the court finds that the plan administrator's interpretation was "wrong," it must then go on to consider whether the interpretation is also arbitrary and capricious.

A plan administrator's determination is not arbitrary and capricious if "there was a reasonable basis for the decision, based upon the facts as known to the administrator at the time the decision was made." Jett v. Blue Cross & Blue Shield of Ala., 890 F.2d 1137, 1139-40 (11th Cir. 1989). See also Paramore v. Delta Air Lines, Inc., 129 F.3d 1146, 1451 (11th Cir. 1997); Buckley v. Metropolitan Life Ins. Co, 115 F.3d 936, 941 (11th Cir. 1997). A reasonable decision must be upheld "even if there is evidence that would support a contrary decision." Jett, 890 F.2d at 1140. Eleventh Circuit cases applying the arbitrary and capricious standard emphasize that the court need only determine "whether [the] interpretation was made rationally and in good faith - not whether it was right." Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37, 39 (11th Cir. 1989). See also Anderson v. CIBA-Geigy Corp., 759 F.2d 1518, 1522 (11th Cir. 1985); Cagle v. Bruner, 112 F.3d 1510, 1518 (11th Cir. 1997); Blank v. Bethlehem Steel Corp., 926 F.2d 1090, 1093 (11th Cir. 1991). This deference extends both to questions of plan interpretation, Adams, 231 F.3d at 842-43, and to fact-finding, Paramore, 129 F.3d at 1449-51.

The Eleventh Circuit grants a great degree of deference to the plan administrator's decision under the arbitrary and

capricious standard of review, HCA Health Services, 240 F.3d at 994 (we "cannot overemphasize the importance of discretion afforded to a claims administrator" under the arbitrary and capricious standard of review), as do other Circuits. See Trombetta v. Cragin Federal Bank for Sav. Employee Stock Ownership Plan, 102 F.3d 1435, 1438 (7th Cir. 1996); Tolson v. Avondale Indus., Inc., 141 F.3d 604, 610 (5th Cir. 1998); Bogue v. Ampex Corp., 976 F.2d 1319, 1325 n.29 (9th Cir. 1992); Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 693 (6th Cir. 1989); Pokratz v. Jones Dairy Farm, 771 F.2d 206, 209 (7th Cir. 1985).

The Eleventh Circuit lists the following factors to be considered by a court in its determination of whether a plan administrator's claim determination was reasonable or rational: (i) the uniformity of the plan administrator's construction of the plan; (ii) "fair reading" and reasonableness of its interpretation; (iii) unexpected or unanticipated costs; (iv) possible concerns that unexpected costs may affect the future financial health of the plan; (v) evidence of bad faith; and (vi) evidence of good faith as evidenced by background facts and procedural regularity. Cagle, 112 F.3d at 1518; Blank, 926 F.2d at 1093; see also Order at 25-26.

Good faith may be found in (1) internal consistency of a plan under the interpretation made by the Administrator; (2) any relevant regulations formulated by the appropriate administrative agencies; and (3) factual background of the determination by a plan and inferences of lack of good faith, if any. Harris v. Pullman Standard, Inc., 809 F.2d 1495, 1497 (11th Cir. 1987). The Court may find that the decision was arbitrary and capricious if the interpretation is "clearly in conflict with the plan's plain language." Seales, at 1319.

Because the role of the court under the arbitrary and capricious standard of review is limited to reviewing the reasonableness of the plan administrator's decision "based upon the facts as known to the administrator at the time the decision was made," Jett, 890 F.2d at 1140, a court cannot consider other facts or other documents not before the plan administrator at the time of its decision. See also, Lee v. Blue

Cross/Blue Shield of Ala., 10 F.3d 1547, 1550 (11th Cir. 1994) (requiring courts "to look only to the facts known to the administrator"). Other federal circuits have similarly held that a court's review of a plan administrator's benefits determination under the arbitrary and capricious standard is limited to a review of the information before the administrator at the time of the decision, and thus the court may *not* consult documents outside of the administrative record. Miller v. United Welfare Fund, 72 F.3d 1066, 1071-72 (2d Cir. 1995); Abnathya v. Hoffman-LaRoche, Inc., 2 F.3d 40, 48 n.8 (3d Cir. 1993); Sheppard & Enouch Pratt Hosp., Inc. v. Travelers Ins. Co., 32 F.3d 120, 125 (4th Cir. 1994); Wilkins v. Baptist Healthcare Sys., Inc., 150 F.3d 609, 615 (6th Cir. 1998); Krawczyk v. Harnischfeger Corp., 41 F.3d 276, 279 (7th Cir. 1994); Barhart v. UNUM Life Ins. Co., 179 F.3d 583, 590 (8th Cir. 1999); Taft v, Equitable Life Assurance Soc., 9 F.3d 1469, 1471 (9th Cir. 1994); Chambers v. Family Health Plan Corp., 100 F.3d 818, 823-824 (10th Cir. 1996).

Against this legal standard, Plaintiffs contend that the Plan Administrator's interpretation of the Plans was arbitrary and capricious because it conflicts with the plain language of the Plans, was applied differently to different separatees, and the manner in which the review was conducted evidenced the "bad faith" of the Plan Administrator.

Defendant counters that the plan administrator's use of the PBGC immediate rate to calculate the lump sum value of Plaintiffs' DVP was not an arbitrary and capricious interpretation of the Plans' language. In support of this contention, Defendants relied upon the general provision in § 6.1 of the Plans which instruct the plan administrator to calculate lump sums based on the PBGC immediate and deferred interest rates, the ISEP and VSIP provisions contain detailed formulae to calculate the "amount of any such lump sum distribution" and to determine "actuarial equivalence" "on the basis of whichever of the following interest rates provide the greater lump sum distribution." Defendants further referenced § 6.6, providing the amendments specify an option using the "PBGC interest rate" or "an interest rate

equal to 120 percent of the PBGC interest rate" for accrued benefits over $25,000. See Service Plan § 22.8(c)(i). Defendants argue that unlike § 6.6(c), the amendments do not contain a further definition of what the "PBGC interest rate" is nor does it refer to the use of "interest *rates*" (plural). Defendants thereby conclude that the ISEP and VSIP provisions therefore refer only to a single interest rate, namely, the PBGC *immediate* interest rate.

In analyzing the first step of an arbitrary and capricious review, Defendants argue that the plan administrator was not "wrong" in concluding that the PBGC immediate interest rate was to be used in calculating lump sums under the ISEP provisions for three reasons. First, Defendants argue that the ISEP and VSIP Articles expressly instructed that the method of computation of a distribution under their provisions is separate and distinct from the Plans' regular calculation provisions and methodology and that they provide a special basis for the computation of the Pension.

Second, Defendants contend that the manner in which the DVP is calculated under the Plan makes use of the PBGC immediate interest rate logical. In this regard, Defendants reason that under § 6.3 of the Plans, if a participant elects to have his DVP commence prior to his normal retirement date, the amount of the DVP is reduced by an appropriate factor to reflect its early commencement. Thus, Defendants argue that because this produces an annuity benefit that commences immediately, it is logical to apply the PBGC immediate interest rate to convert the early retirement annuity into a lump sum.

Finally, Defendants assert that the ISEP calculation provisions do not contain the language that is found in the Plans' regular calculation provisions which mandates use of the deferred rates, namely § 6.6(b)(i)(3). Instead, Defendants again emphasize that the relevant provisions only refer to an interest "rate" in the singular. For those reasons, Defendants argue that the use of the PBGC immediate rate was not "wrong" on the applicable case law and therefore the plan administrator's interpretation must be upheld. Alternatively,

Defendants argue that even if the Court finds the decision was "wrong," it was not one reached arbitrarily and capriciously because the Claims Review Committee's interpretation of the Plans as not requiring the use of the deferred interest rates when calculating Plaintiffs' lump sum distributions was reasonable. Further, the Plan administrator fairly addressed Plaintiffs' challenges in reconsidering the manner in which benefits were calculated.

Based on the parties' submissions, the evidence and testimony presented at trial and all the exhibits submitted, the Court finds that the plan administrator's interpretation using the PBGC immediate rate was within the discretion of the plan administrator. The Court does not necessarily agree that the calculation of the benefits was correctly computed, nor does it have to reach agreement on this issue. Even assuming a finding by the Court that the plan administrator's interpretation was "wrong," the decision cannot be said to have been an arbitrary and capricious one.

The Claims Review Committee's interpretation of the Plans as not requiring the use of the deferred interest rates when calculating Plaintiffs' lump sum distributions was consistent with the interpretation of identical provisions in earlier amendments to the Telops and Service Plans, was consistently applied to all Special Separatees under the same amendment and under the same Plan, and was made after consultation with experienced outside counsel and actuaries. Specifically, Donna Chiffriller testified that although she did not personally undertake an independent review of the claims in this case, she and her committee reviewed the submissions, consulted in the normal course and relied on the advise of GTE's in-house counsel, Kathy Wallace who had consulted with actuary Bill Young and Attorney John Vine, a lawyer with expertise in this field.

One of the formulae, contained in § 6.6(b)(i)(3) of the Plan, provides that the present value is calculated based on the "PBGC interest rate," or "120 percent of the PBGC interest rate" for amounts exceeding $25,000, and defines the PBGC interest rate as

> [T]he interest rate or rates in effect 90 days before the payment date of the lump sum distribution that would be used by the PBGC to value a participant's vested benefit upon termination of a trusteed single employer plan.

Service Plan Article VI § 6.6(b)(i)(3); Telops Plan Article VI § 6.6(b)(i)(3).

The Plan's inclusion of the singular and plural forms of the word rate is open to varying interpretations. The Committee's ultimate interpretation which resulted in the use of a single rate therefore cannot be said to have been arbitrary and capricious. Moreover, there is no evidence that the Plan Administrator acted in bad faith in interpreting the plan to allow the use of the PBGC immediate interest rate.

Additionally, the evidence of record demonstrates that Plaintiffs' claims went through the Plans' thorough review process. First, a preliminary "first level" review of the claim was undertaken, and a detailed discussion of the plan provisions and the claims was given in a written denial letter dated July 24, 1997. Second, the Claims Review Committee met on January 13, 1998 with all five voting members of the Committee participating and the attendance of the Plan's counsel to review all information concerning Plaintiffs' claims. It was at this meeting, and in consideration of all of the evidence and legal advice before it, that the Committee affirmed the denial of Plaintiffs' requests for additional benefits.

Further, ISEP booklets given to Plaintiffs, even if properly submitted to the Court for consideration, did not specify the precise interest rate that would be used to calculate the value of a lump sum payment of the Deferred Vested Pension. None of the ISEP booklets mentioned the PBGC immediate interest rate, the PBGC immediate and deferred interest rates, or any other specific interest rate.

Although the Plaintiffs' interpretation of the Plans is understandable and may arguably even be the more reasonable interpretation, the Court, in evaluating Count I, must defer to the reasonable interpretation offered by the Plan

Administrator when two reasonable interpretations of the Plan provisions are offered. See HCA Health Services v. Georgia Health Ins. Co., 240 F3d at 994. Accordingly, the Undersigned finds that the Plan Administrator's interpretation of the Plans was reasonable and not arbitrary and capricious.

II. WHETHER THE PAYOUT UNDER THE ISEP PLAN VIOLATED ERISA

The Court's inquiry now moves to Plaintiffs' statutory claim under ERISA §205(g)(3), 29 U.S.C. § 1055(g)(3). Plaintiffs contend that in conducting the required ERISA compliance analysis, Defendant improperly included the SEP in calculating whether Plaintiffs' retirement benefits were being paid consistent with the minimum requirements of the statute. The parties do not dispute that the DVP benefit is an accrued benefit. Plaintiffs argue, however, that the SEP benefit is not an accrued benefit or part of their "normal retirement benefit" under ERISA and, therefore, could not be considered in this compliance analysis. Plaintiffs contend that it was improper for GTE's actuary, William Young, to add the SEP annuity to the DVP annuity and then discount that composite annuity to present value to derive the base number against which to test ERISA compliance. The effect of the inclusion of the SEP in the calculus was to permit Defendant to use a higher rate of return to calculate the present value of the benefit that would have been permitted if the DVP were considered as the sole pension benefit. This, Plaintiffs suggest, resulted in the underpayment of their lump sum benefit.

Defendant contends that the SEP benefit was properly included with the DVP benefit in determining ERISA minimum payout requirements. This is so, Defendant contends, because the SEP and DVP are together a "normal retirement benefit" or a single accrued benefit under ERISA and applicable law. Defendant also suggests that Plaintiffs should not be heard to complain here because the amounts Plaintiffs actually received are greater than the minimum required under the statute. Thus, Defendant argues, it did not

violate either the letter or spirit of ERISA.

More specifically, in this regard, Defendant contends that because the SEP and DVP were correctly added together as one optional accrued benefit, allowing the present value of the optional benefit to surpass the $25,000 ERISA compliance requirement, the use of the 100% factor was correct. Accordingly, GTE asserts that it did not violate ERISA when calculating Plaintiffs' lump sum benefits. This argument, however, is vested in the assumption by GTE, its attorney advising at the time of payout, and its actuaries that the SEP *is* an accrued benefit.[3]

In this case if the SEP were properly included in the ERISA compliance analysis, the payout would have met the statute's minimum payout requirement. On the other hand, the parties agree that if the SEP should not have been included, the benefits paid to the Plaintiffs would not have met the minimum payout requirements set forth in ERISA, and the compliance analysis should have been conducted as Plaintiffs suggest without consideration of the SEP.[4]

The threshold question, therefore, is whether the SEP is a part of Plaintiffs' accrued benefit under the law of ERISA and therefore was properly considered along with the DVP in the ERISA compliance analysis. Reference to the statute and its related legislative history is important to this consideration.

First, Treasury Regulation §1.411(a)-11(d), made

---

[3]In the letter denying Plaintiffs' benefits, Kathleen Wallace, Defendant's benefits attorney wrote: "Each claimant's *normal retirement benefit* consisted of the sum of the Deferred Vested Pension *and* the SEP Annuity, commencing at age 65." (emphasis added) See Initial Denial Letter (6/24/97)(Plaintiff's Exhibit 55, Bates 0729).

[4] It is helpful to place this debate in context to show how Plaintiffs arrived at the conclusion that they were underpaid. Plaintiffs' proposed calculation of is attached to the Court's order as "Appendix A."

applicable to ERISA §205(g) by ERISA §3002(c), states that, in determining the present value of an accrued benefit, the plan must take into account the valuation rules set forth in Internal Revenue Code §417(e) and Treasury Regulation §1.417(e)-1(d). ERISA §205(g)(3) provides that the maximum rate of interest that may be utilized to compute the present value of a participant's accrued annuity benefit is the rate that would be used by the Pension Benefit Guaranty Corporation ("PBGC rate") for determining the present value of a lump sum distribution on plan termination (or 120% of that rate if the present value exceeds $25,000 utilizing solely the PBGC rate). Treasury Regulation 1.417(e)-1(d) provides as follows:

> Present value requirement - (1) Requirements. For purposes of determining the present value of any *accrued* benefit and for purposes of determining the amount . . . of any distribution including a single sum, a defined benefit plan is subject to the interest rate limitations described in subparagraph (2) of this paragraph (d) at the time set forth in subparagraph (3) of this paragraph (d) (emphasis added). A plan amendment that changes the rate described in this paragraph (d) is subject to section 411(d)(6). The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with this paragraph.
>
> (2) Section 417 interest rate. The section 417 interest rate is (i) the rate or rates that would be used by the Pension Benefit Guaranty Corporation (PBGC) for a trusteed single-employer plan to value the participant's (or beneficiary's) vested benefit ("applicable interest rate") if the present value of such benefit does not exceed $25,000 and (ii) 120 percent of the applicable interest rate, as determined in accordance with (i) above, if

> such present value exceeds $25,000. In no event shall the present value determined by use of 120 percent of the applicable interest rate result in a present value less than $25,000. The applicable interest rate may be a series of interest rates for any given date. . . [t]he applicable interest rates are determined by the PBGC regulations. See 29 CFR Part 2619 for the applicable PBGC rates.

Decoded, the upshot is that an optional form of pension benefit may not penalize a plan beneficiary. To ensure that it does not, the statute mandates that the employer compare the employee's accrued pension benefit under the alternative scheme to the amount the participant would otherwise receive as a normal retirement benefit. The language of the treasury regulation set forth above refers to accrued benefits in the context of ERISA. The last sentence of the "present value requirement" section of this regulation refers to the "present value of any optional form of benefit" but does not use the word "accrued." Given the context of this regulation and the goals of ERISA as outlined below, the only reasonable construction is that this regulation refers only to accrued pension benefits and their consideration in the compliance analysis. Defendant's contrary contention is unpersuasive.

Further, a minimum payout standard is set by ERISA in subsection 2 of this regulation. Specifically, if the present value of "such" relevant optional benefit (the "such" apparently referring back to the accrued benefit) is less than $25,000, then 100% of the PBGC rate should be used to determine the lump sum benefit upon involuntary separation. On the other hand, if the present value of the optional benefit is more than $25,000, then 120% of the PBGC rate should be used to calculate lump sum payouts. Further, according to the statute, in the event that the calculation requires use of 120% of the PBGC rate, the present value of the benefit to be paid, determined by use of that rate, may never result in an amount less than $25,000.

The Courts have recognized that one of Congress' goals in enacting ERISA was to protect the defined benefits in a pension plan by ensuring that a plan participant receives the actual benefit that he or she is promised. See Nachman v. Pension Benefit Guaranty Corp., 446 U.S. 359, 375, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980).

The term "accrued benefit" is defined by section 3(23) of ERISA to refer to an "annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23). When analyzing a benefit under ERISA this statutory definition cannot be altered simply by labeling benefits as accrued or supplementary benefits. Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union, 980 F.2d 465 (7th Cir. 1992). Nor is the Administrator's determination dispositive of this issue as explained in the Court's order of August 29, 2000 (Dkt. 99). ERISA § 3(24) defines "normal retirement age" as the earlier of (A) the time a plan participant attains normal retirement age under the plan or (B) the later of (i) the time a plan participant attains age 65, or (ii) the 10th anniversary of the time a plan participant commenced participation in the plan. 29 U.S.C. § 1002(24). Additionally, the Plans define "normal retirement age" as "age 65." (Service Plan Article II, p. 2-12; TelOps Plan Article II, p. 2-11.)

The legislative history offers some indication of Congress' intent regarding the definition of the term "accrued benefit." The House Conference Report explains that "[u]nder the conference substitute, the term "accrued benefit" refers to pension or retirement benefits . . . Also, the accrued benefit does not include the value of the right to receive early retirement benefits . . . or other benefits under the plan which are not continued for any employee after he has attained normal retirement age." H.R. Conf.Rep. No. 1280, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5054.

In considering whether the SEP in this case was an accrued benefit under ERISA, the Court finds further guidance in cases that analyze in different ERISA compliance contexts

whether a separation benefit is an accrued benefit or not.[5] It is important to note that the present case presents an interesting twist to the "normal" context in which Courts visit this issue. Generally, the employer argues that a withdrawn benefit is *not* an accrued benefit such that the Plan Administrator should be granted discretion to withdraw benefits without violating certain protective provisions of ERISA. Employees, on the other hand, generally seek to prohibit withdrawal of benefits contending that the benefit is accrued. Significantly, employers are generally successful in contending that benefits such as those at issue here are not accrued benefits.

For example, Roper v. Pullman Standard, 859 F.d2d 1472 (11th Cir. 1988), involved Plaintiffs who challenged their employer's denial of retirement benefits upon a plant shutdown and alleged that the Plan involved in their case violated provisions of ERISA. Specifically, Plaintiffs relied on 29 U.S.C. § 1056(a), which provides that where there is an early retirement benefit in a Plan, employees who meet the service requirements but who are separated from the company before satisfying the age requirement are nonetheless entitled to receive a benefit not less than the accrued benefit to which they are entitled at their normal retirement age. Id. at 1473.

The Court, holding for the employer, agreed with the district court's analysis that § 1056(a) was inapplicable because the early payout plan did *not* provide employees a nonforfeitable accrued pension benefit as contemplated by the statute. Id. The Court reasoned that the plan "encompasse[d] other factors besides age and years of service" to trigger entitlement of benefits. Id. Importantly, the Court stated: "The 'other factors' [under the plan] . . . that are necessary to implement the benefits are the conditions of separation: plant shutdown, lay-of or disability. Just reaching the age and

---

[5] ERISA does not provide a definition of accrual but nothing in ERISA suggests that such key terms have varying meanings in different contexts within this same statutory framework.

service requirements alone does not create any benefits entitlement." Id. at 1473-74 (emphasis supplied). Because of these "other factors" the Court concluded that the early pay out benefits were not "accrued" or "normal retirement benefits."

The Court in Roper also acknowledged the holding in Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc., 847 F.2d 329 (6th Cir. 1988). While the Eleventh Circuit indicated that the Ross holding was not necessary to its affirmance in Roper, it agreed that Ross supported the district court's decision in the case.

In Ross, employees brought an ERISA action against the pension plan after they were denied plant shutdown benefits. Id. at 330. In affirming the district court's grant of summary judgment, the Court held that plant shutdown benefits were *not* benefits protected under the ERISA provision relating to plan amendments. Id. at 333. Further, the Court found that plant shutdown benefits could not be characterized as commencing at normal retirement age inasmuch as they were only available to employees whose active service ceased by reason of shutdown. Id. The Court stated that "[e]arly retirement benefits are generally benefits that become available upon retirement at or after a specified age which is below the normal retirement age, and/or upon completion of a specified period of service." Id.

As the Roper Court noted, Ross discussed a pension provision similar to the plan in Roper and it too determined that the pension could not be considered an early retirement plan because it contained conditions other than age and service. Roper, 859 F.2d at 1474. Recognizing a difference in the analysis between the district court in Roper and the Ross case, the Eleventh Circuit nonetheless acknowledged that the same conclusion was reached: shut down, lay off, and severance type benefits are not considered accrued pension benefits under section 1056(a) because under the plans at issue "conditions other than age and service" were necessary to trigger payment. Id.

Plaintiff also rely on Sutton v. Weirton Steel Div. Of

Nat'l Steel Corp., 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) (*citations omitted*), in support of their argument that the SEP is not an accrued benefit. In Sutton, in addition to normal retirement benefits, Plaintiffs' employer provided early retirement benefits and severance pay in the event of shutdown or layoffs to employees who met certain age and service requirements. Holding that these contingent benefits were not accrued benefits, the Court stated, "[t]he accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits" Id. at 410.

Unlike the benefit in Sutton, the SEP benefit in the present case was a funded benefit. The Court's decision in Sutton, however, was not based on the funded or unfunded nature of the benefits.[6] See Hickey v. Chicago Truck Drives, Helpers & Warehouse Workers Union, 980 F.2d 465 (7th Cir. 1992). In considering the employer's violation under ERISA, the Sutton Court reasoned that the ERISA legislative history indicated that Congress intended to exclude ancillary benefits such as severance benefits from the definition of accrued benefits. See Sutton, 724 F2d at 410 (citing H.R.Rep. No. 807, 93d Cong., 2d Sess. 60), *reprinted* in 1974 U.S.Code Cong. & Ad.News 4890, 4935; see also Hickey, 980 F.2d at 470. The case before this Court presents a benefit, payment of which is also

---

[6] It is important to note that the Sutton Court had before it two claims of violations under ERISA. First, the Court considered the employer's violation under ERISA based on its capacity as Plaintiffs' employer. Second, the Court considered whether the employer, in its capacity as a fiduciary, violated ERISA. In the context of considering a breach of fiduciary duties, which claim has been dismissed in the instant case, the Sutton Court's decision turned on the unfunded nature of the contingent benefits in that case. See Sutton, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) (*citations omitted*).

contingent upon factors other than age and service requirements. Payment of the SEP benefit was triggered by events such as reductions in force or shutdowns. Upon the occurrence of such an event, the SEP was payable at retirement age only if the employee made the decision to take it at that time. More importantly, GTE, expressly retained a right to withdraw the benefit prior to separating an individual under the Plan. Thus, there was no "accruing" of the benefit. Further, the SEP is not a benefit that employees are entitled to receive unless and until they have been involuntarily separated without cause and then only if the program is still in force and effect. In this regard, the administrators made clear by their testimony that the SEP benefit did not vest in the employee in any amount unless and until an employee was separated under the Plan, which by definition means that the benefit did not accrue.

Donna Chiffriller, the plan administrator during the relevant time period for this case and the Service Corporation's director of benefits and Rita Galgano, the Service Corporation's executive responsible for designing the ISEP's and VSIP's, testified that the SEP benefit was intended to replace HR 104 and that its purpose was to shift the severance obligation from the Service Corporation to the pension plan because the plan was so over funded. Their testimony also established that the SEP benefit was intended to be the severance program for special separtees under the ISEP and VSIP.

Finally, the Plan specifically states that this benefit is not accrued. Article XXII states:

> (a) No benefit shall accrue under this Article XXII. This Article XXII does not provide for an accrued benefit or an additional accrued benefit for any Employee, and the enhancement of a Special Retiree's Pension under Section 22.5, 22.6 or 22.7 does not constitute, and shall not be deemed to be an accrued benefit.

GTE Service Plan, Article XXII §22.8(a). Thus, the only

conclusion that can be reached is that the SEP was not at the time of the Plaintiffs' involuntary separation, an accrued benefit. Therefore, it should not have been considered with the DVP in the ERISA compliance analysis.

As noted above, Defendant argues that the inquiry should not focus simply on accrual. Rather, Defendant contends that the SEP benefit should be considered a normal retirement benefit under ERISA or under applicable law. In support of this argument, Defendant points out that the SEP was treated as a "normal retirement benefit" in many respects. As noted in the findings of fact, the benefit is available to be paid at normal retirement age. Employees were also given to option of rolling the benefit over into an IRA as part of the pension package. Additionally, the value of the plan benefits were designed to cover any tax penalty that might be imposed on the early withdrawal pension benefit. Although in these respects the SEP benefit bore characteristics of a "normal retirement benefit," Defendant's argument that it is one fails.

Aside from the significant fact that the benefit is not accrued like a normal retirement benefit, a recent Eleventh Circuit decision discussed, inter alia, the notion of "normal retirement benefits." Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan, 221 F.3d 1235 (11th Cir. 2000). Lyons involved former employees who sued Georgia-Pacific and its retirement plan challenging the calculation of a voluntary lump sum distribution of benefits under ERISA. Specifically, the primary dispute in that case was whether ERISA § 203(e), 29 U.S.C. § 1053(e), and the Treasury regulations interpreting that provision required Georgia-Pacific to calculate Plaintiffs' lump sum benefits by determining the amount they would have received at the normal retirement age of 65 and then discounting that amount back to present value using the PBGC discount rate. Id. at 1241.

The plan in the Lyons case created for each participant a hypothetical account balance at a rate greater than that used under ERISA Section 203(e), and defined the plan's "normal retirement benefit" using that rate. Id. Upon early retirement,

Georgia-Pacific looked to the hypothetical account balance to determine the lump sum benefit due prior to normal retirement age. It did not consider the participant's true normal retirement benefit or project that account balance forward and then discount it back to present value as the Court found was required under ERISA.[7] Id. at 1252.

In concluding that ERISA as interpreted by IRS Code §411 was violated, the Court looked first to ascertain what was the normal retirement benefit. Though much of its reasoning in Lyons' is code specific, the conclusion on this issue is succinctly stated by the Court. The Court stated "the 'normal retirement benefit' . . .is the amount a participant would have received under the Plan but for the election to take an early lump sum distribution." Id. That Court concluded that ERISA compliance did not take into account the hypothetical account projected by Georgia Pacific. Only the amount the Plaintiff would have actually received at retirement age was properly to be considered in evaluating whether the payment actually received was consistent with ERISA.

While the Lyons court's conclusion was guided by the specific Plan in dispute, the Plan in this case supports the same conclusion. All agree that the Plan specifically states that the SEP is not an accrued benefit. The Defendant's counsel stated that he "wish[ed] that Section 22.8 said 'no benefit accrues under this plan...unless and until someone is separated'." Even if that statement had been included, it would have not been sufficient.

That proposed statement looks at the benefit a Plaintiff would have received only upon actually terminating under the SEP Plan. Obviously, that event necessarily occurs prior to "normal retirement" under the Plan.

Under the Plan at issue here, the SEP is not available to

---

[7] For the lead plaintiff, the failure to follow the regulations under Code Section 411(e) caused a loss of $13,232.68. There was an overall loss of approximately $20 million for the class a whole. Id. at 1239 and n.6.

beneficiaries "upon normal retirement" because if they work until retirement they necessarily have not been involuntarily separated for cause prior to retirement. The question, therefore, is not what would have been the retirement benefit under the alternate option offered under the ISEP plan and whether the ISEP alternative was more or less favorable to the Plaintiffs than the ISEP option they exercised. Rather, the question is what would have been the normal retirement benefit had the early out plan not been implemented at all and whether the accrued retirement benefit conferred under the plan was more or less favorable than the Plaintiffs' normal retirement benefit. Thus, whether or not the beneficiaries *could have* elected to *receive* the SEP benefit at normal retirement age or whether upon such election the benefit *would have* been calculated upon immediate payment or payment at age 65, it is undisputed that the SEP benefit is not normally payable upon retirement. Indeed it, by definition, is not available in the normal course at retirement.

It is important to note that while the payment of SEP benefits under the Plan benefitted GTE, it appears that GTE's primary purpose in designing these plans was to provide a substantial benefit to its employees who were involuntarily separated from the company. GTE attempted, among other things, to connect the SEP and pension together to grant their separated employees the option to take their pension immediately instead of waiting until normal retirement age. Unfortunately, while apparently trying to do the right thing, GTE fell victim to one of ERISA's many land mines. The SEP, which is not a normal retirement benefit or an accrued benefit, should not have been included in the ERISA compliance analysis.

CONCLUSION

In accordance with the foregoing, the Undersigned finds in favor of Plaintiffs as to Count II of the complaint and in favor of Defendant as to Count III of the complaint.

DONE and **ORDERED** in Tampa, Florida on October 29, 2001.

MARY S. SCRIVEN
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Parties

APPENDIX "A"

Plaintiffs posit the following: Ms. Bowles was 40 years and 6 months old at the time of her lump sum distribution. ERISA required the administrator to determine first the present value of the deferred vested pension annuity (DVP). The parties agree that the PBGC immediate rate in effect at the relevant time period was 5%. When the immediate rate is 5%, the applicable lump sum factor under the 100% PBGC immediate and deferred rates at age 40 years and six months is 3.3783. This figure, converted to a monthly factor, is 40.53960 (3.3783 x 12). When the annualized factor is multiplied by Ms. Bowles' annual DVP annuity of $8.347.44[8], the resultant lump sum would equal $28,200.16.[9] Having derived the maximum pay out to which the employee would be entitled the employer then can determine the minimum amount that it can pay consistent with ERISA constraints. ERISA offers two interest rate structures. The higher the maximum entitlement, the lower the rate of return available to

[8] This amount results from the monthly annuity of $695.62 being multiplied by 12 months. The DVP annuity amounts are not in dispute in the case.

[9] The same amount results if the monthly factor of 40.53960 is multiplied by Ms. Bowles' monthly DVP annuity of $695.62.

the employer. The lower the maximum benefit the higher the rate. Thus, under ERISA, if the resulting annuity exceeds $25,000 the employer applies a 100% PBGC immediate and deferred rate to determine a claimant's DVP lump sum. Because Ms. Bowles' lump sum equals more than $25,000, Plaintiffs demand use of the 120% rates to determine Ms. Bowles' minimum payout of her accrued benefit.

Using the 120% rates, as Plaintiffs' suggest, results in a 31.0938 monthly factor at age 40 years and 6 months at 6% (5% immediate rate x 120% = 6%). When this factor is multiplied by Ms. Bowles' monthly annuity of $695.62, the lump sum calculated is $21,629.47. Under ERISA § 205(g), the minimum lump sum payable under the 120% rates if $25,000. Thus, Plaintiffs argue that Ms. Bowles' minimum DVP lump sum should have been $25,000 rather than $21,629.47. When Ms. Bowles' SEP lump sum of $28,248.68 is added to the minimum DVP lump sum of $25,000, the aggregate lump sum totals $53,248.68. The lump sum actually distributed to Ms. Bowles was $46,392.46. Accordingly, Plaintiffs argue that Ms. Bowles was underpaid by $6,856.22. As noted earlier, this calculation assumes that the DVP is the only accrued benefit.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
02MAY06 AM
10:14
CLERK OF THE COURT
MIDDLE DISTRICT OF
FLORIDA
TAMPA, FLORIDA

SHEILA WIMBUSH-BOWLES,
and BETTY CONINE,

Plaintiffs,

(ii) Case No: 8:98-cv-598-T-MSS

GTE SERVICE CORPORATION PLAN
FOR EMPLOYEES' PENSION, et al.,

Defendants.

ORDER

This cause came on for consideration of Plaintiffs' Motion for Class Damages on Their Claim Under ERISA §205(g), and for Pre-judgment Interest (Dkt. 154) and Defendants' Memorandum in Opposition to Plaintiffs' Motion (Dkt. 157).

Plaintiffs request that this Court establish the proper methodology for computing each Class member's damages and further that the Court aware pre-judgment interest on the damages determined for each Class member.

In its January 2, 2002, Order (Dkt. 13), the Court directed the parties to stipulate, if possible, to the amount of additional benefits due each of the two named Plaintiffs and to a formulaic or descriptive order than can be applied to calculate the additional benefits due all other Class members, consistent with the Court's Order of October 30, 2001. Plaintiffs and Defendants have reached agreement regarding

the additional benefits and will separately file a stipulation with the Court. Thus, the only remaining issue for resolution by the Court is whether Plaintiffs' additional pension benefits should be enhanced by an award of pre-judgment interest.

Plaintiffs assert that they should be awarded pre-judgment interest on the amount of the benefit shortfall owed to them and all other Class members from the date of the underpayment through the date of entry of judgment.

Plaintiffs first suggest that the Court should set the pre-judgment interest rate at the rate earned on Plan assets. They estimate the average annual rate of return for the Plans for the relevant period of 1992 through 2000 at 12.97%. Alternatively, Plaintiffs suggest that the Court may choose to apply the Florida pre-judgment interest rate statute, Fla. Stat. §687.01, and apply the weighted average pre-judgment interest rate for the relevant time period, which Plaintiffs calculate at 10.50%.

Defendants argue that the circumstances of this case do not justify an award of pre-judgment interest at all and that even if the Court were to award pre-judgment interest, it should utilize neither the rate nor the method of calculation Plaintiffs advocate. Rather, Defendants suggest the Court award interest at a rate not to exceed the applicable PBGC deferred interest rate. In the alternative, Defendants suggest using the federal post-judgment rate set forth in 28 U.S.C. § 1961(a).

Further, Defendants argue that Plaintiffs' proposed method of interest calculation is skewed. In this regard, Defendants first argue that Plaintiffs' suggestion that interest should be awarded from the date after each class member received his or her initial lump sum pension payment does not take into consideration the delay in this litigation resulting from Plaintiffs' own actions. Secondly, Defendants contend that Plaintiffs' proposal that the interest rate be averaged over the class period is both inaccurate and unfairly prejudicial to Defendants.

The Court, having considered the parties' respective positions and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Relevant Findings of Fact

Sheila Wimbush-Bowles ("Bowles") was discharged on June 21, 1993. She received her lump sum distribution on July 1, 1993. Betty Conine was discharged on November 16, 1995, and receiver her lump sum distribution on December 1, 1995. On September 9, 1996, Plaintiffs initially filed a class action complaint in this Court (Case No. 96-1790-CIV-T-21A) setting forth essentially the same allegations that were presented in their subsequently filed complaint in the instant case. On March 11, 1997, finding that Plaintiffs had failed to exhaust their administrative remedies under the Plans, the Honorable Ralph W. Nimmons, Jr. granted Defendants' Motion to Dismiss without prejudice to the refiling of such an action after such time as Plaintiffs exhausted their administrative remedies.

On May 30, 1997, Plaintiffs' counsel requested in writing that the Pension Plan Administrators review Ms. Conine's an Ms. Wimbush-Bowles' claims for additional benefits. By letter dated July 24, 1997, Kathleen Wallace, General Attorney for GTE Service Corporation's Benefits department, informed Plaintiffs' counsel that Plaintiffs' claims for additional benefits were denied. By letter dated September 18, 1997, Plaintiffs' counsel requested in writing that GTE's Claims Review Committee review the initial denial of Plaintiffs' claim. The Claims Review Committee met on January 13, 1998, to discuss Wimbush-Bowles' and Conine's requests for additional pension benefits under the Plans. The Committee ultimately denied the requests for additional benefits and Plaintiffs were informed of the decision by letters to their counsel dated February 3, 1998. Plaintiffs then re-filed their class action complaint in this Court on March 23, 1998.

II. Conclusions of Law

The Court has discretion to award pre-judgment interest under ERISA. See Moon v. Am. Home Assurance Co., 888 F.2d 86, 89-90 (11th Cir. 1989)("[T]he award of pre-judgment interest under ERISA is a matter committed to the sound discretion of the trial court[.]"); Smith v. Am. Int'l Life Assurance Co. of N.Y., 50 F.3d 956, 958 (11th Cir. 1995)(pre-judgment interest may be awarded in the district court's discretion); Florence Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield of Ala., 41 F.3d 1476, 1484 (11th Cir. 1995)(same). In the ERISA context, "[w]hether [pre-judgment] interest will be awarded is a question of fairness...to be answered by balancing the equities." Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan, 750 F.2d 1458, 1465 (9th Cir. 1985).

In any event, an award of pre-judgment interest, if granted, should be compensatory rather than punitive. Osterneck v. E.T. Barwich Indus., 825 F.2d 1521, 1536 (11th Cir. 1987).

A. Pre-judgment Interest Rate

The Court finds that pre-judgment interest should be awarded in this case as a matter of fairness. Plaintiffs were the prevailing party in this case. The Court found that Defendants miscalculated Plaintiffs' benefits, and, as a result, Plaintiffs have been denied the use of those funds during the time benefits have been withheld. Defendants, on the other hand, have had use of the funds for the benefit of the Plans in this interim period and will continue to have use of the funds until they have exhausted all levels of appeal. While not an intentional or improper deprivation, Defendants' miscalculation, twice confirmed and unsuccessfully defended, has cost the Class a considerable amount of money. Moreover, the balance of equities can be addressed by setting the amount and timing of the pre-judgment interest award.

In this regard, the Court rejects Plaintiffs' suggestion

that the pre-judgment rate should be the rate earned on Plan assets, which Plaintiffs estimate would be 12.97%. An award of pre-judgment interest at this rate would be punitive in nature; and therefore, the Court agrees with Defendants that such a rate would be unfair given the circumstances of this case. Further, as Defendants point out, an award at this rate assumes that individual participants, had they received additional benefits, would have been able to obtain the same rate of return that the Pension Trust was able to command via its large portfolio. Additionally, it ignores the fact that an award of interest at this rate would permit Plaintiffs to enjoy risk enhanced returns having themselves incurred no risk.

The Court also declines to use the Florida statutory rate. That rate has been repeatedly rejected by appellate and trial courts, including this one, as being inappropriately punitive and failing to promote uniformity in ERISA cases. See, e.g., Ford v. Uniroyal Pension Plan, 154 F.3d 613, 168-20 (6th Cir. 1998); Cottrill v. Sparrow, Johnson & Ursillo, 100 F.3d 220, 225 (1st Cir. 1996); Reid v. Prudential In. Co. of Am., 755 F. Supp. 372, 376 (M.D. Fla. 1996).

Finally, the Court rejects Defendants' argument that if pre-judgment interest is awarded, the rate should equal the applicable PBGC deferred interest rate. That rate does not reflect the rate that Plaintiffs would have received in the market had there been no delay in paying Plaintiffs' full benefits.

The Court finds that the federal post-judgment rate pursuant to 28 U.S.C. § 1961(a) is the fairest option to both parties. The Court agrees with Defendants that using the § 1961(a) rate satisfies the need to establish a reasonable market rate without the need for expert testimony from dueling economists.[1] Scores of courts around the country, including within the Eleventh Circuit, have applied the § 1961(a) interest rate in the context of ERISA litigation. See, e.g., Cottrill v.

---

[1] The Court declines Plaintiffs' offer to provide expert testimony on the appropriate interest rate in this case.

Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220, 224-25 (1st Cir. 1996)(affirming application of § 1961 interest rate); Ford v. Uniroyal Pension Plan, 154 F.3d 613, 619 (6th Cir. 1998)(same); see also Reid v. Prudential Ins. Co. of Am., 755 F. Supp 372, 376-77 (M.D. Fla. 1990)(applying § 1961 interest rate); Harrison v. Aetna Life Ins. Co., 925 F. Supp. 744, 758 (M.D. Fla. 1996)(same). Indeed, the Eighth and Ninth Circuits have gone so far as to establish the § 1961(a) rate as the presumptive interest rate in ERISA cases. See Mansker v. TMG Life Ins. Co., 54 F.3d 1322, 1331 (8th Cir. 1995)(§ 1961(a) "provides the proper measure for determining rates of both pre-judgment and post-judgment interest"); Grosz-Salomon v. Paul Revere Life Ins. Co., 237 F.3d 1154, 1164 (9th Cir. 2001). Moreover, this Court, in a prior ERISA case, has stated that the § 1961(a) rate is "an appropriate rate to compensate plaintiff fully, without punishing defendant." Reid, 755 F.Supp. at 377.

B. Time Period for Pre-Judgment Interest Award

Plaintiffs request that the Court award pre-judgment interest commencing on the date of the Class members' prior lump sum distribution and continuing until the date the Court issues a judgment regarding Class damages.

Defendants suggest that if pre-judgment interest is awarded, the time period over which pre-judgment interest is calculated should not commence before March 23, 1998, when Plaintiffs filed the complaint commencing this action. In this regard, Defendants submit that Plaintiffs themselves delayed the award of additional benefits when they failed to first exhaust their administrative remedies under the Plans and instead filed a lawsuit in this Court in September 1996. As noted earlier, that suit was dismissed for failure to exhaust administrative remedies. Thus, Defendants contend that Plaintiffs' actions in allegedly attempting to circumvent the Plan administrative process directly contributed to the delay in their receipt of the benefits that this Court has now awarded.

Having considered the parties' positions, the Court

finds that the appropriate date from which pre-judgment interest should accrue is February 3, 1998, the date the Claims Review Committee informed Plaintiffs that it had made its final decision to deny Plaintiffs' requests for additional benefits. First, this is an easily ascertainable date reflected in writing in records that are in evidence in this case. Such a date would permit uniformity at the federal level in ERISA cases. Further, there can be no confusion but that by this date the Plan had considered the alleged error and confirmed it upon review. The Plan cannot contend at this point that it was unaware of the potential consequences of its decision to reject an appeal. At this point it was on notice that its decision was being challenged and might well result in an adverse ruling by a Court subjecting the Plan to an additional levy and interest. Finally, such an award also encourages Plaintiffs to exhaust their administrative remedies in advance of pursuing an action in courts of law, which is what the law requires.[2]

CONCLUSION

In accordance with the foregoing, the Court **ORDERS** that:

Plaintiffs' Motion for Class Damages on Their Claim Under ERISA §205(g), and for Pre-judgment Interest (Dkt. 154) is **GRANTED** as outlined above. Plaintiffs are awarded pre-judgment interest at the federal post-judgment rate pursuant to 28 U.S.C. § 1961(a), which shall accrue from February 3, 1998, through the date the Court issues a judgment regarding Class damages.

---

[2] It should be noted that there was no evidence presented that Defendants' administrative appeals process was unreasonably delayed. In a case where unreasonable delay is proven, it could be reasonably argued that Plaintiffs should not be punished by a Defendant's unreasonable delay at the administrative level.

DONE and **ORDERED** in Tampa, Florida on May 3, 2002.

_____

MARY S. SCRIVEN
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
02JUL22 PM
5:05
CLERK OF THE COURT
MIDDLE DISTRICT OF
FLORIDA
TAMPA, FLORIDA

SHEILA WIMBUSH-BOWLES,
and BETTY CONINE,

Plaintiffs,

(iii) Case No: 8:98-cv-598-T-MSS

GTE SERVICE CORPORATION PLAN
FOR EMPLOYEES' PENSION, et al.,

Defendants.

ORDER

This cause came on for consideration without oral argument on Plaintiffs' Motion for Reconsideration of Interest Rate (Dkt. 160) and Defendants' Memorandum in opposition thereto (Dkt. 161).

The Court has considered the parties' positions on the matter and finds that the pre-judgment interest shall be calculated in accordance with the plain language of the Federal Post-Judgment Rate statute, 28 U.S.C. § 1961(a). That section states that "[s]uch interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment."

The Court declines Plaintiffs' request that it follow the Ninth Circuit's contrary approach of using a series of differing 52-week Treasury bill rates in calculating pre-judgment

interest. See Nelson v. EG&G Energy Measurements Group, Inc., 37 F.3d 1384, 1391-92 (9th Cir. 1994). As Defendants point out, the Ninth Circuit has recently awarded the post-judgment in an ERISA case to be calculated as expressly mandated by the statute thereby foregoing its previously awarded complicated approach. See Grosz-Salomon, 237 F.3d 1154, 1163-64 (9th Cir. 2001).

The Court's order dated May 3, 2002 (Dkt. 159) therefore stands as entered. Because the date of judgment remains undetermined until the Court receives a stipulation on damages, the exact rate to be applied in calculating pre-judgment interest cannot be calculated at this point.

DONE and **ORDERED** in Tampa, Florida on July 22, 2002.

MARY S. SCRIVEN
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
02 SEP 11 PM 5:02
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

SHEILA WIMBUSH-BOWLES, and BETTY CONINE, individually and on behalf of all others similarly situated,

Plaintiffs,

v. : Case No. 8:98-cv-598-T-MSS

GTE SERVICE CORPORATION PLAN FOR EMPLOYEES' PENSIONS, et al.,

Defendants.

---/

ORDER AND FINAL JUDGMENT

Plaintiffs Sheila Wimbush-Bowles and Betty Conine ("Plaintiffs") brought this action individually and on behalf of all others similarly situated against defendants GTE Service Corporation Plan for Employees' Pensions, GTE Telephone Operations Salaried Pension Plan, the Employee Benefits Committee of the GTE Service Corporation Plan for Employees' Pensions, and the Employee Benefits Committee of the GTE Telephone Operations Salaried Pension Plan ("Defendants"), alleging violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). Plaintiffs' Amended Class Action Complaint

presented three Counts, each directed at Plaintiffs' claim that the lump sum distributions they received from the Defendant pension plans were inadequate.

The Court certified a class of employees who received lump sum distributions from the Defendant pension plans in connection with certain special pension programs, known as ISEPs or VSIPs, following their voluntary or involuntary termination of employment (Dkt. #61). The class definition was later limited to employees who terminated employment and received lump sum distributions before January 1, 2000 (Dkt. #112).

Following the parties' cross-motions for summary judgment, the Court dismissed Count I of the Amended Complaint, which alleged a breach of fiduciary duty. August 30, 2000 Order (Dkt. #99). Following a bench trial held on April 16 to 18, 2001, the Court issued findings of fact and conclusions of law in an Order entered on October 30, 2001 (Dkt. #151). The Court found in Plaintiffs' favor on Count II of the Amended Complaint, which alleged a violation of ERISA §205(g)(3), 29 U.S.C. § 1055(g)(3), and in Defendants' favor on Count III of the Amended Complaint, which alleged that defendants had misinterpreted the Plans.

The parties have stipulated to the additional pension benefits due each of the named Plaintiffs and to a formula to calculate the additional benefits due each other member of the class, consistent with the Court's October 30, 2001 Order regarding liability. On May 3, 2002, the Court entered an Order granting in part Plaintiffs' motion for pre-judgment interest (Dkt. #159). The Court clarified and confirmed its ruling regarding pre-judgment interest in an Order dated July 22, 2002 (Dkt. #162).

In accordance with this Court's prior Orders and the parties' Joint Stipulation, it is hereby **ORDERED, ADJUDGED** and **DECREED** that:

1. In accordance with the Court's ruling on Count II of the Amended Class Action Complaint, defendant GTE Service Corporation Plan for Employees' Pensions (the "Service Plan") shall pay Plaintiff Sheila Wimbush-Bowles an additional

pension benefit in the amount of $6,856.22, such amount being the difference between (a) $25,000, which was the present value of her Deferred Vested Pension (without regard to the SEP enhancement) as of the date of her lump sum distribution, July 1, 1993, and (b) $18,143.78, which was the lump sum value of the Deferred Vested Pension (without regard to the SEP enhancement) previously paid to her by the Service Plan. The foregoing amounts are computed as follows:

(a) The present value of Wimbush-Bowles' Deferred Vested Pension (without regard to the SEP enhancement) is calculated as of July 1, 1993 based on (a) the value of her Deferred Vested Pension payable at normal retirement age of 65, which was a life annuity of $695.62 per month, *see* Def. Trial Ex. 15 at Bates 2642 (GTE Salaried Plan Calculation Worksheet), and (b) actuarial factors reflecting the Service Plan's mortality assumptions and the PBGC immediate and deferred interest rates in effect for April 1993, 90 days prior to the date of her lump sum distribution. The actuarial factor applicable to Wimbush-Bowles using 100% of the PBGC immediate and deferred interest rates in April 1993, when the PBGC immediate interest rate was 5.0%, was 40.5396, producing a present value of $28,200.16. Because this present value exceeded $25,000, the Service Plan was permitted to use 120% of the PBGC rates in accordance with ERISA § 205(g)(3) 29 U.S.C. § 1055(g)(3) (prior to amendment by the Retirement Protection Act of 1994, Pub. L. No. 103-465, § 767(c)). The actuarial factor applicable using 120% of the PBGC immediate and deferred interest rates in April 1993 was 31.0938, producing a present value of $21,629.47. ERISA § 205(g)(3), however, required that the present value of a benefit calculated using 120% of the PBGC interest rates cannot be less than $25,000. The present value of Wimbush-Bowles' Deferred Vested Pension (without regard to the SEP enhancement) therefore is $25,000.

(b) The lump sum payment of the Deferred Vested Pension (without regard to the SEP enhancement) that

Wimbush-Bowles actually received was the difference between her total lump sum benefit, which was $46,392.46, and the amount of her SEP Lump Sum, which was $28,248.68. *See* Pre-Trial Statement, Concise Statement of Those Facts Which Are Admitted and Will Require No Proof at Trial ¶¶ 21-22; Def. Trial Ex. 15 at Bates 2643. The difference was $18,143.78.

2. In accordance with the Court's ruling on Count II of the Amended Class Action Complaint, defendant GTE Service Corporation Plan for Employees' Pensions, as successor to the GTE Telephone Operations Salaried Pension Plan (the "Telops Plan"), shall pay Plaintiff Betty Conine an additional pension benefit in the amount of $7,031.61, such amount being the difference between (a) $23,826.12, which was the present value of her Deferred Vested Pension (without regard to the SEP enhancement) as of the scheduled date of her lump sum distribution, December 1, 1995, and (b) $16,794.51, which was the lump sum value of the Deferred Vested Pension (without regarding to the SEP enhancement) previously paid to her by the Telops Plan. The foregoing amounts are computed as follows:

(a) The present value of Conine's Deferred Vested Pension (without regard to the SEP enhancement) is calculated as of December 1, 1995 based on (a) the value of her Deferred Vested Pension payable at normal retirement age of 65, which was a life annuity of $475.38 per month, *see* Def. Trial Ex. 16 at Bates 2668 (GTE Pension Calculation Worksheet), and (b) actuarial factors reflecting the Telops Plan's mortality assumptions and the PBGC immediate and deferred interest rates in effect for September 1995, 90 days prior to the scheduled date of her lump sum distribution. The actuarial factor applicable to Conine using 100% of the PBGC immediate and deferred interest rates in September 1995, when the PBGC immediate interest rate was 5.0%, was 50.12016, producing a lump sum of $23,826.12. Because this lump sum is less than $25,000, 120% of the PBGC interest rates could not be used under ERISA § 205(g)(3). The present

value of Conine's Deferred Vested Pension (without regard to the SEP enhancement) therefore is $23,826.12.

(b) the lump sum payment of the Deferred Vested Pension (without regard to the SEP enhancement) that Conine actually received was the difference between her total lump sum benefit, which was $35,053.62, and the amount of her SEP Lump Sum, which was $18,259.11. *See* Pre-Trial Statement, Concise Statement of Those Facts Which Are Admitted and Will Require No Proof at Trial ¶¶ 28-29; Def. Trial Ex. 16 at Bates 2668-69. That difference was $16,794.51.

3. In accordance with the Court's ruling on Count II of the Amended Class Action Complaint, defendant GTE Service Corporation Plan for Employees' Pension shall pay each class member, other than the named Plaintiffs, an additional pension benefit in an amount equal to the difference between (a) the present value of his or her Deferred Vested Pension (without regard to the SEP enhancement), determined using the Service Plan's or the Telops Plan's (as the case may be) mortality assumptions and the PBGC immediate and deferred interest rates in effect 90 days before the scheduled date of the class member's lump sum distribution, or 120% of such PBGC interest rates if the present value exceeds $25,000, but no less than $25,000 when using 120% of such PBGC rates, and (b) the amount previously distributed by the Service Plan or the Telops Plan (as the case may be) as the lump sum value of his or her Deferred Vested Pension (without regard to the SEP enhancement). The calculation of these additional pension benefits shall be performed in accordance with the methods described above for the named Plaintiffs, using the best data and information that is available; provided, however, that Defendants shall not be required to incur an undue burden in connection with the acquisition or procurement of such data and information.

4. In accordance with the Court's Order dated May 3, 2002 (Dkt. #159), each named Plaintiff and class member is awarded pre-judgment interest on the additional pension benefit described in paragraphs 1 to 3 above, such interest to

accrue from February 3, 1998 (or, if later, from the date of a class member's lump sum distribution from the defendant Service Plan) through the date of this Final Judgment, compounded annually. In accordance with the Court's Orders dated May 3, 2002 and July 22, 2002 (Dkt. #162), pre-judgment interest shall be calculated at the federal post-judgment interest rate determined pursuant to 28 U.S.C. § 1961(a) - *i.e.*., using an interest rate "equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." Pre-judgment interest shall be paid by the Service Plan.

5. In accordance with 28 U.S.C. § 1961, each named Plaintiff and class member is awarded post-judgment interest on the additional pension benefit described in paragraphs 1 to 3 above, as increased by the pre-judgment interest awarded in paragraph 4. With respect to each named Plaintiff and class member, post-judgment interest shall be computed using an interest rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of this Final Judgment, compounded annually, from the date of this Final Judgment until the date of distribution of the additional pension benefit to each such named Plaintiff or class member. *See* 28 U.S.C. § 1961(a). Post-judgment interest shall be paid by the Service Plan.

6. The payments of additional pension benefits and related pre- and post-judgment interest pursuant to this Final judgment shall be subject to appropriate deductions and withholding under federal, state and local tax laws applicable to distributions from tax-qualified defined benefit pension plans. The payments made pursuant to this Final Judgment shall be made in conformity with applicable law regarding the distribution of benefits from a tax-qualified defined benefit pension plan and with the applicable terms of the Service Plan or the Telops Plan (as the case may be), except as otherwise provided in this Final Judgment or in the Court's Order of October 30, 2001.

7. Count I and Count III of the Amended Class Action Complaint are dismissed with prejudice.

8. The Court reserves jurisdiction over the implementation and enforcement of the terms of this Final Judgment, including without limitation the computation of the additional pension benefit due each class member under paragraph 3 above. In the event the parties are unable to agree whether Defendants would incur undue burden in connection with the acquisition or procurement of data and information to calculate the amounts of additional pension benefits, Defendants shall promptly seek a determination from the Court concerning such disputed issued.

9. Subject only to the preceding paragraph, entry of this Order and Final Judgment resolves all claims that have been asserted in this litigation. The Clerk is **DIRECTED** to close this case and enter final judgment in favor of Plaintiffs.

DONE and **ORDERED** in Tampa, Florida on September 11, 2002.

s/Mary S. Scriven
MARY S. SCRIVEN
United States Magistrate Judge

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
February 3, 2004
THOMAS K. KAHN
CLERK

No. 02-15580

D.C. Docket No. 98-00598 CV-T-25

Sheila WIMBUSH-BOWLES, individually and on behalf of all others similarly situated, and BETTY CONINE, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants
Cross-Appellees,

versus

GTE SERVICE CORPORATION PLAN FOR EMPLOYEES' PENSIONS, GTE TELEPHONE OPERATIONS SALARIED PENSION PLAN, MEMBERS OF THE EMPLOYEE BENEFITS COMMITTEE OF GTE SERVICE CORPORATION PLAN FOR EMPLOYEES' PENSIONS, in their roles as fiduciaries, MEMBERS OF THE EMPLOYEE BENEFITS COMMITTEE OF GTE TELEPHONE OPERATIONS SALARIED PENSION PLAN, in their roles as fiduciaries, jointly and severally,

Defendants-Appellees
Cross-Appellants.

Appeals from the United States District Court for the Middle District of Florida

(February 3, 2004)

Before EDMONDSON, Chief Judge, COX, Circuit Judge, and PAUL***, District Judge.

PER CURIAM.

This appeal and cross-appeal both concern whether the district court, through a magistrate judge, erred when it found that the plan administrator of GTE's pension plans properly interpreted the terms of the Plan but that the Plan, as so interpreted, violated ERISA § 205(g). For the reasons which follow, we find that the decision of the district court should be reversed and the plan administrator's interpretation of the plan should be upheld in its entirety.

Under § 205(g)(3) of ERISA, a company with an ERISA plan can allow a separating employee to select to receive her retirement benefits immediately, rather than at normal retirement age, and in a lump sum, rather than an annuity, so long as the lump sum amount is no less than the present value of the 'normal retirement benefit' to which that participant would have been entitled had she waited until normal retirement age to receive the benefit.

Specifically, Treas. Reg. § 1.417(e)-1(d)(2), which implements ERISA, states "[t]he present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with this

***Honorable Maurice M. Paul, United States District Judge for the Northern District of Florida, sitting by designation.

paragraph." Furthermore, cases have explained that "a vested participant in a defined benefit plan must receive a benefit that is the actuarial equivalent of her normal retirement benefit (that is, the accrued benefit expressed as an annuity beginning at normal retirement age)." Edsen v. Bank of Boston, 229 F.3d 154 (2nd Cir.2000).

Thus, a plan administrator's task is to first determine the "accrued benefit" that a person would receive at normal retirement and then to reduce that to present value using actuarial techniques. That is what happened in the instant case. The plaintiffs are a class of GTE employees who participated in various defined benefit plans provided by the company and who had been separated from GTE for reasons other than cause. As discussed more fully below, GTE provided such "special separatees" a deferred vested pension benefit and an SEP benefit, which was a sort of severance package for them.

If these two benefits were always treated as distinct entities--one a severage package, the other a pension--this case probably never would have arisen. But GTE linked the two benefits in various ways. First, both could be paid out as an annuity or as a lump sum. However, second, they both had to be paid out in the same form. Thus, an employee could not get her SEP benefit as a lump sum and her deferred vested pension as an annuity, they had to both be a lump sum or both be an annuity.

Here, all the employees in the class chose the lump sum distribution, and two sources of controversy arose: (1) whether the plan administrator included the right benefits in determining what the "accrued benefit" of each employee should be, and (2) whether the plan administrator used the right interest rate or rates in determining the present value of that accrued benefit.

To determine whether the early lump sum option is worth at least as much as the benefit the employee would receive at normal retirement age, ERISA establishes specific requirements for determining the present value of the normal retirement benefit. The first task is to determine what the

"normal retirement benefit" is. That determination is made by reference to the plan itself: "The 'normal retirement benefit' itself, before it is discounted to present value, is determined in accordance with the Plan. It is the amount a participant would have received at age 65 under the Plan but for the election to take an early lump sum benefit." Lyons v. Georgia Pac. Salaried Employees Ret. Plan, 221 F.3d 1235, 1252 (11th Cir.2000).

Once the normal retirement benefit is ascertained, Treasury regulations establish specific rules for calculating the "present value" of that benefit for purposes of assessing compliance with § 205(g). Esden, 229 F.3d at 164 ("For the purposes of this rule, the regulations do not leave a plan free to choose its own methodology for determining the actuarial equivalent of the accrued benefit expressed as an annuity payable at normal retirement age."); Treas. Reg. § 1.411(a)-11(d) ("In determining the present value of any distribution of any accrued benefit from a defined benefit plan, the plan must take into account specified valuation rules. For this purpose, the valuation rules are the same valuation rules for valuing distributions as set forth in section 417(e); see § 1.417(e)-1(d)."). The interest rate used for calculating the present value of the normal retirement annuity is important because of the inverse relationship between the interest rate and present value of the annuity: "the higher the rate used to discount future payments to present value, the lower that present value will be." Mathews v. Sears Pension Plan, 144 F.3d 461, 464 (7th Cir.1998).

Section 1.417(e)-1(d)(2) of the Treasury regulations, as it existed from 1988 to 1995 (the version applicable here), directed plans to interest rates used by the Pension Benefit Guaranty Corporation for payout of benefits upon plan termination, often referred to as the "PBGC rate":

> Section 417 interest rate. The section 417 interest rate is (i) the rate or rates that would be used by the Pension Benefit Guaranty Corporation (PBGC) for a trusteed single-employer plan to value the

> participant's (or beneficiary's) vested benefit ("applicable interest rate") if the present value of such benefit does not exceed $25,000 and (ii) 120 percent of the applicable interest rate, as determined in accordance with (i) above, if such present value exceeds $25,000. The applicable interest rate may be a series of interest rates for any given date ... The applicable interest rates are determined by the PBGC regulations. See 29 CFR Part 2619 for the applicable PBGC rates.

Treas. Reg. § 1.417(e)-i(d)(2). "What the Treasury regulation adds is that once the normal retirement benefit is ascertained in accordance with the Plan, that amount is then to be discounted to present value using the PBGC rate in order to calculate the minimum lump sum distribution to which the participant is entitled." Lyons, 221 F.3d at 1252.

There are two Plans at issue in this case, one of which covers each class member. One plan is called the Service Plan and the other the TelOps Plan. Both are defined benefit plans sponsored by various GTE affiliates (collectively "GTE") and are, in all respects relevant to this appeal, essentially identical. Thus the parties cite only the Service Plan provisions (Doc. 145, PX1A, 1B, 19A) and we refer only to "the Plan" unless there is a material difference.

The basic normal retirement benefit under the Plan is a Service Pension, paid in the form of a life annuity commencing at normal retirement age (age 65). Plan § 6.1(a); PS X¶ 6. The amount of the Service Pension is the product of a formula whose principal components are the participant's years of service and final years' average annual compensation. Plan § 6.1(a). Employees who meet certain age and service requirements may retire early and begin receiving their Service Pension immediately, before reaching age 65. Id. § 5.3.

In general, however, employees with vested benefits who leave GTE before they are eligible to retire may not receive their benefits until they turn 65. This deferred benefit is called a Deferred Vested Pension ("DVP"), which is

computed in the same way as the Service Pension. The DVP is payable as a life annuity commencing after the participant reaches age 65. Id. § 6.3.

The Plan designates the GTE Employee Benefits Committee as the "Plan Administrator," vesting in the Administrator "discretionary power" to "interpret the Plan and to decide all matters arising thereunder, including the right to remedy possible ambiguities, inconsistencies, and omissions," Plan § 9.4(b), and to "determine the right of any person to benefits under the Plan and the amount of such benefits," id. § 9.4(c); see id. § 9.13(a). Any participant who is denied benefits to which she believes she is entitled may file a claim for benefits with the Administrator (who may be an individual designated by the Committee). Id. § 9.13(a). If the Administrator denies the claim, the participant may appeal to the Committee, whose decision is final and conclusive. Id. § 9.13(b).

During the 1990s, GTE on occasion amended its Plans to enhance the retirement benefits available to employees who were involuntarily terminated during workforce reductions. These enhanced benefits are the focus of this dispute. GTE amended the Service Plan in 1993 to add Article XXII, which established a Qualified Involuntary Separation Program ("ISEP"). The ISEP applied exclusively to employees in certain GTE units who were "discharged by the Company between November 1, 1992 ... and December 31, 1993, inclusive, for a reason other than cause." Plan § 22.7(a). The discharged employees eligible for benefits under the ISEP are called "Special Separatees." Id. § 22.2(r). Plaintiff Bowles was a Special Separatee under this Service Plan ISEP. PS X¶ 12.4. GTE amended the TelOps Plan in 1995 to add Article XXXIII, which created an ISEP in all substantive respects identical to the 1993 Service Plan ISEP. TelOps Plan § 33.1. Plaintiff Conine was a Special Separatee under this TelOps Plan ISEP. PS X¶ 14.

The ISEP made three key changes in the normal retirement benefit for Special Separatees. First, the ISEP provided Special Separatees with a normal retirement benefit

significantly enhanced in comparison to the benefit accorded other participants.

Under § 22.7(b), a Special Separatee is entitled to:

> (i) a Service Pension if he is eligible for a Service Pension under Section 5.1 or 5.3, or
>
> (ii) a Deferred Vested Pension if he is not described in paragraph (i) of this subsection (b) and he is eligible for a Deferred Vested pension under Section 5.5,
>
> with his Service Pension or Deferred Vested Pension, as the case may be, enhanced by the SEP Annuity.

In slightly plainer terms, a Special Separatee already entitled to retire with a Service Pension at the time of separation would have her Service Pension annuity "enhanced by the SEP Annuity." Likewise, a Special Separatee entitled only to an annuity benefit deferred until she reaches normal retirement age (i.e., the DVP) would have that deferred benefit enhanced by the same SEP Annuity. The "SEP annuity" is derived from what the Plan labels the "SEP Lump Sum", which is based on the Special Separatee's years of service and average annual compensation. Plan § 22.2(n). Note, therefore, that the SEP enhancement is not "age sensitive," Doc. 147, at 171; that is, a participant entitled to a certain SEP Lump Sum will receive exactly that amount (or its actuarially equivalent annuity, in the form of monthly payments from her actual age at benefit commencement), regardless of when she actually takes the benefit, id.

Second, the ISEP gave Special Separatees the choice whether to begin receiving their enhanced benefits immediately, or to wait until the age at which they would otherwise be allowed to begin receiving pension benefits, or at any age in between. Plan § 22.8(b).

Third, the ISEP allowed Special Separatees the option of receiving their enhanced benefits either as an annuity payable or in the form of a single lump sum. Plan § 22.8(b) & (c)(i). The

ISEP specifically provided, however, that a Special Separatee must receive her pension benefit enhancement "at the same time and in the same form as the remainder (if any) of the ... Special Separatee's Pension." Plan § 22.8(b). In other words, as noted above, a Special Separatee receives only a single enhanced benefit in a single form (lump sum or annuity).

At trial, the defendants offered uncontroverted evidence that the provision tying the basic pension benefit together with the separation enhancement has consistently been interpreted by the Plan Administrator as creating a single, accrued, normal retirement benefit for Special Separatees. The defendants contend, therefore, that the single life annuity a Special Separatee would receive at normal retirement age under the ISEP consists of the basic annuity she would receive at age 65, enhanced by the SEP Annuity, derived by converting the fixed SEP Lump Sum to the annuity a Special Separatee would receive at age 65. (In making this conversion, according to defendants, one must assume that the Special Separatee waited until age 65 to take the SEP enhancement, because that enhancement must be taken at the same time and in the same form as the basic benefit. Plan § 22.8(b).) Those two components, combined into a single monthly payment commencing at normal retirement age, constitute the normal retirement benefit under the ISEP for Special Separatees. DXI 1, at 730 ("normal retirement benefit" for Special Separatees such as plaintiffs "was a single retirement benefit equal to the sum of the Deferred Vested Pension and the SEP Annuity").

In addition to directly increasing the dollar amount of the monthly benefits to which Special Separatees are entitled at retirement age, and giving them the option of receiving immediate payment of those benefits in a single lump sum, the ISEP worked a third improvement in Special Separatees' retirement benefits: it gave a significant subsidy to Special Separatees who elected to take their benefits early. The fact that the SEP Lump Sum does not vary by age means that if the Special Separatee elects to take her pension benefit years before reaching normal retirement age--20 and 25 years before for the plaintiffs here--she will receive substantially more in

value from the SEP enhancement than she would if she waited until normal retirement age. In other words, because a Special Separatee who is entitled to a SEP enhancement of $28,000 upon reaching age 65 still receives the full $28,000 if she elects to take her benefit immediately, at, say, age 40. She gets the added value of 25 years of use of the $28,000.

Because the SEP Lump Sum is not discounted for payment before age 65, the ISEP adds a significant subsidy to the already enhanced normal retirement benefit Special Separatees would otherwise receive at age 65 under the ISEP. Doc. 147, at 175 ("[B]ecause the ISEP lump sum doesn't change with age, it is a very, very subsidized benefit.... [It] is much more valuable paying it today than paying it at age 65. And so given tha[t] it is much more valuable payable today, it is--it is a subsidy on the benefit."). And because the SEP Lump Sum and SEP Annuity are actuarial equivalents at any age both forms of SEP enhancement are more valuable if taken before normal retirement age.

In addition to these changes in the benefits of Special Separatees, the ISEP provides a specific formula for calculating the actuarially equivalent total lump sum for Special Separatees' enhanced benefits. The ISEP requires use of a specified mortality table and whichever of two interest rates produces the larger lump sum: the six-month moving average yield of certain U.S. treasury bonds, or either (i) the PBGC immediate rate if the vested accrued benefit to be distributed is not more than $25,000, or (ii) 120% of the PBGC immediate rate if the benefit exceeds $25,000. Plan § 22.8(c)(i).

The district court, through a magistrate judge, held a bench trial and found that the defendant properly interpreted the terms of the Plan, but that the Plan, as properly interpreted, itself violated ERISA § 205(g). Doc. 151. The court held that the SEP enhancement was not part of a Special Separatee's "accrued benefit" under ERISA and thus could not be "considered along with the DVP in the ERISA [§ 205(g)] compliance analysis." Id. at 18. The court therefore considered the question to be whether the DVP component of each plaintiff's lump sum payment, standing alone, met or

exceeded the present value of her basic DVP, using the PBGC deferred rates. Since the Plan had used only the higher PBGC immediate rates for calculating the DVP component, the present value of just the DVP component was lower than it would have been using the lower PBGC deferred rates. The court therefore held that application of the Plans' benefit formula to the plaintiffs, though permissible under the terms of the Plan itself, violated ERISA § 205(g).

The question whether the lump sums paid to plaintiffs violated ERISA § 205(g) is a pure question of law, reviewed de novo by this Court. Horton v. Reliance Std. Life Ins. Co., 141 F.3d 1038, 1041 (11th Cir.1998). The plaintiffs contend that the calculation of their lump sum distributions violate ERISA § 205(g). Plaintiffs argue that the Plan had erred in calculating their lump sum distributions because it used an incorrect interest rate to discount the DVP component of their combined single benefit. According to plaintiffs, the Plan was prohibited from using only the PBGC rate applicable to immediate benefit distributions (the "PBGC immediate rate"), and was required instead to use the lower interest rates applicable to distributions of benefits that would otherwise be deferred (the "PBGC deferred rates"). Plaintiffs further asserted that the enhanced Special Separatee benefit is in reality two distinct benefits: (i) the basic deferred pension benefit (the DVP), and (ii) an entirely separate SEP benefit which is more like a severance package.

Plaintiffs reasoned that the Plan's use of only the PBGC immediate rate to calculate the present value of the DVP component, rather than PBGC immediate rate and the lower PBGC deferred rates, caused the Plan to compute DVP lump sums that were too small--assuming the DVP component is a distinct benefit to which the lower rates must be applied--and thus to underpay their total combined benefits. Under plaintiffs' theory, if the present value of the DVP component of Bowles' benefit was calculated using the PBGC deferred rates of 4.25 and 4.0 percent, rather than just the 5 percent immediate rate, the calculated present value of the DVP' component of her benefit would have been $6,856.22 higher.

The same approach would have resulted in a payment to Conine of $7,031.61 more than she received. Plaintiffs sought additional payments from the Plan in those amounts.

On the other hand, the defendants reject plaintiffs' interpretation of the Plan as providing two distinct retirement benefits to Special Separatees. The defendant argues that each plaintiff's "normal retirement benefit under the Plan was a single retirement benefit equal to the sum of the Deferred Vested Pension and the SEP Annuity." DXI 1, at 730; see id. 731 ("The Plan provision granting ISEP benefits provides that the SEP Annuity and the Deferred Vested Pension forms a single benefit.... [T]he SEP Annuity increases the Deferred Vested Pension, and is not a separate benefit." (citing Plan §§ 22.7(b) & 22.8(b)); id. at 732 ("the participant's entire accrued benefit would be the Deferred Vested Pension enhanced by the SEP annuity").

Based on its conclusion that the DVP combined with the SEP enhancement is a single retirement benefit, the defendant then rejects plaintiffs' view that the PBGC deferred rates should be applied to the DVP component of the benefit in isolation. According to defendant, plaintiffs' normal retirement benefit under the Plan was the DVP enhanced by the SEP annuity--not the DVP standing alone-- and therefore the sole question was whether the lump sum amount each plaintiff received was less than the present value of that entire normal retirement benefit calculated using the PBGC immediate and deferred rates. Id.

Because "the SEP Lump Sum is a fixed amount that is not actuarially reduced for payment prior to reaching normal retirement age," and is therefore "substantially subsidized for payment prior to early retirement age," the Plan Administrator explained in his letter denying benefits, the SEP enhancement subsidy more than compensates for the lower present value assigned to the unenhanced DVP component resulting from the Plan's use of the PBGC immediate rate. Id. at 730. Thus the total lump sum amount actually paid was much higher than the present value of the "entire normal retirement benefit payable at age 65"--i.e., the DVP enhanced by the SEP

annuity--even using the PBGC immediate and deferred rates. Id.

We find that the defendants have the better argument here. A simple, mechanical analysis of the words "accrued benefit" is not sufficient to decide this matter. Since the SEP annuity was not payable until termination, and the company could end the program at any time before then, the magistrate judge determined that the benefit was not accrued and therefore not part of the "normal retirement benefit." The question of whether the benefit is accrued is not the proper question, however.

The "accrual" question is only one part of the larger question: what would the employee's retirement benefit be if taken at the normal time? With regard to that question, it is clear that the SEP Annuity and the DVP were wrapped together at all times. As quoted above, Plan section 22.7(b) provides that the separatees have to take each the SEP Annuity and the DVP at the same time and in the same format. Moreover, the plan administrator's testimony is uncontradicted that the SEP Annuity was not reduced to present value with the intent that it be a subsidy on the DVP for those who were forced to leave the company for reasons other than cause. To allow that subsidy and then to nevertheless apply the lower interest rate (which results in higher present payouts) presents a windfall to the plaintiffs. Therefore, the decision of the district court is REVERSED and REMANDED with instructions to the district court to uphold the plan administrator's interpretation of the plan in its entirety.

United States Court of Appeals

For the Eleventh Circuit

No. 02-15580

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Feb 3, 2004
THOMAS K. KAHN
CLERK

District Court Docket No.
98-00598 CV-T-25

Sheila WIMBUSH-BOWLES,
individually and on behalf of
all others similarly situated,
BETTY CONINE, individually and
on behalf of all others similarly situated,

Plaintiffs-Appellants
Cross-Appellees,

versus

GTE SERVICE CORPORATION PLAN
FOR EMPLOYEES' PENSIONS,
GTE TELEPHONE OPERATIONS SALARIED
PENSION PLAN, MEMBERS OF THE EMPLOYEE BENEFITS
COMMITTEE OF GTE SERVICE CORPORATION PLAN FOR
EMPLOYEES' PENSIONS, in their roles as fiduciaries,
MEMBERS OF THE EMPLOYEE
BENEFITS COMMITTEE OF GTE TELEPHONE
OPERATIONS SALARIED PENSION PLAN, in
their roles as fiduciaries, jointly and severally,

Defendants-Appellees
Cross-Appellants.

Appeals from the United States District Court
For the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged. and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: February 3, 2004
For the Court: Thomas K. Kahn, Clerk
by: Gilman, Nancy

ISSUED AS MANDATE

SEPT 16 2004

U.S. COURT OF APPEALS
ATLANTA GA

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP -8 2004
THOMAS K. KAHN
CLERK

No. 02-15580-FF

SHEILA WIMBUSH-BOWLES,
individually and on behalf of
all others similarly situated,
BETTY CONINE, individually and
on behalf of all others similarly
situated,

Plaintiffs-Appellants
Cross-Appellees,

versus

GTE SERVICE CORPORATION PLAN
FOR EMPLOYEES' PENSIONS,
GTE TELEPHONE OPERATIONS SALARIED
PENSION PLAN,
MEMBERS OF THE EMPLOYEE BENEFITS
COMMITTEE OF GTE SERVICE CORPORATION
PLAN FOR EMPLOYEES' PENSIONS, in their
roles as fiduciaries,
MEMBERS OF THE EMPLOYEE BENEFITS
COMMITTEE OF GTE TELEPHONE OPERATIONS
SALARIED PENSION PLAN, in their roles
as fiduciaries, jointly and severally,

Defendants-Appellees
Cross-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARIND EN BANC

(Opinion _____, 11th Cir., 19____, _____ F.2d _____.

Before: EDMONDSON, Chief Judge, COX, Circuit Judge, PAUL*, District Judge.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s J.L. Edmondson
CHIEF JUDGE

*Honorable Maurice M. Paul, United States District Judge for the Northern District of Florida, sitting by designation.

ORD-42
(12/01)

LABOR STATUTES INCORPORATED IN ERISA

29 U.S.C. §186(c)

(c) Exceptions

The provisions of this section shall not be applicable (1) [n/a] . . .; (2) [n/a] . . .; (3) [n/a] . . .; (4) [n/a/] . . . medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) [n/a] . . .; and (C) . . . pensions or annuities for employees . . .; (6) . . . pooled vacation, holiday, **severance or similar benefits**, or defraying costs of apprenticeship or other training programs . . .; (7) . . . scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing . . .; (8) . . . costs of legal services for employees, their families, and dependents for counsel or plan of their choice . . .; or (9) [n/a/] . . ..

(emphasis added)

ERISA STATUTES

29 U.S.C. §1001

§ 1001.Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of

plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. §1002(1)

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) **any benefit described in section 186(c) of this title** (other than pensions on retirement or death, and insurance to provide such pensions).

(emphasis added)

29 U.S.C. §1002(2)

(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by surrounding circumstances such plan, fund, or program--

(i)provides retirement income to employees . . .

* * *

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which--

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the

increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

29 U.S.C. §1002(3)

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan **or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.**

(emphasis added)

29 U.S.C. §1002(19)

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

29 U.S.C. §1002(23)

(23) The term "accrued benefit" means–

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

* * *

29 U.S.C. §1053(a)

Minimum vesting standards

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A) or (B).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is
3	20
4	40
5	60
6	80
7 or more	100.

* * *

29 U.S.C. §1054(c)(3)

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

(emphasis added)

29 U.S.C. §1055(g)
(as formulated before 1995)

(g) Distribution of present value of annuity; written consent; determination of present value.

(1) A plan may provide that the present value of a qualified joint and survivor annuity or a qualified preretirement survivor annuity will be immediately distributed if such value does not exceed $ 3,500. No distribution may be made under the preceding sentence after the annuity starting date unless the participant and the spouse of the participant (or where the participant has died, the surviving spouse) consent in writing to such distribution.

(2) If--

(A) the present value of the qualified joint and survivor annuity or the qualified preretirement survivor annuity exceeds $ 3,500, and

(B) the participant and the spouse of the participant (or where the participant has dies, the surviving spouse) consent in writing to the distribution,

the plan may immediately distribute the present value of such annuity.

(3) (A) For purposes of paragraphs (1) and (2), the present value shall be calculated-

(i) by using an interest rate no greater than the applicable interest rate if the vested accrued benefit (using such rate) is not in excess of $ 25,000, and

(ii) by using an interest rate no greater than 120 percent of the applicable interest rate if the vested accrued benefit exceeds $ 25,000 (as determined under clause (i)).

In no event shall the present value determined under subclause (II) [sic, clause (ii)] be less than $ 25,000.

(B) For purposes of subparagraph (A), the term "applicable interest rate" means the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

29 U.S.C. §1132

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

* * *

(B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

* * *

INTERNAL REVENUE CODE STATUTES

26 U.S.C. §401(a)(4)

§401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification.–A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section–[listing design and operational requirements under subparagraphs (1) through (34)]

* * *

(4) if the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees (within the meaning of section 414(q)). . . .

26 U.S.C. §411(c)(1)-(3)

(c) Allocation of accrued benefits between employer and employee contributions.--

(1) Accrued benefit derived from employer contributions.--For purposes of this section, an employee's accrued benefit derived from employer contributions as of any applicable date is the excess, if any, of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2) Accrued benefit derived from employee contributions. [n/a/] . . .

(3) Actuarial adjustment.--For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, **the employee's accrued benefit,** or the accrued benefits derived from contributions made by an employee, as the case may be, **shall be the actuarial equivalent of such benefit or amount determined under paragraph (1)** or (2).

(emphasis added)

26 U.S.C. §411(d)(6)

(6) Accrued benefit not to be decreased by amendment.--

(A) In general.--A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

(B) Treatment of certain plan amendments.--For purposes of subparagraph (A), a plan amendment which has the effect of--

(i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(ii) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment

conditions for the subsidy. The Secretary shall by regulations provide that this subparagraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary may by regulations provide that this subparagraph shall not apply to a plan amendment described in clause (ii) (other than a plan amendment having an effect described in clause (i)).

* * *

26 U.S.C. §412(l)(7)

(7) Current liability.--For purposes of this subsection--

(A) In general.--The term "current liability" means all liabilities to employees and their beneficiaries under the plan.

(B) Treatment of unpredictable contingent event benefits.--

(i) In general.--For purposes of subparagraph (A), any unpredictable contingent event benefit shall not be taken into account until the event on which the benefit is contingent occurs.

(ii) Unpredictable contingent event benefit.--The term 'unpredictable contingent event benefit' means any benefit contingent on an event other than--

(I) age, service, compensation, death, or disability, or

(II) an event which is reasonably and reliably predictable (as determined by the Secretary).

26 U.S.C. §417(e)
(as formulated before 1995)

(e) Restrictions on cash-outs.

(1) Plan may require distribution if present value not in excess of $ 3,500. A plan may provide that the present value of a qualified joint and survivor annuity or a qualified preretirement survivor annuity will be immediately distributed if such value does not exceed $ 3,500. No distribution may be made under the preceding sentence after the annuity starting date unless the participant and the spouse of the participant (or where the participant has died, the surviving spouse) consents in writing to such distribution.

(2) Plan may distribute benefit in excess of $3,500 only with consent. If–

(A) the present value of the qualified joint and survivor annuity or the qualified preretirement survivor annuity exceeds $ 3,500, and

(B) the participant and the spouse of the participant (or where the participant has died, the surviving spouse) consent in writing to the distribution, the plan may immediately distribute the present value of such annuity.

(3) Determination of present value.

(A) In general. For purposes of paragraphs (1) and (2), the present value shall be calculated–

(i) by using an interest rate no greater than the applicable interest rate if the vested accrued benefit (using such rate) is not in excess of $ 25,000, and

(ii) by using an interest rate no greater than 120 percent of the applicable interest rate if the vested accrued benefit exceeds $ 25,000 (as determined under clause (i)).

In no event shall the present value determined under clause (ii) be less than $25,000.

(B) Applicable interest rate. For purposes of subparagraph (A), the term "applicable interest rate" means the interest rate which would be used (as of the date of the distribution) by the

Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

DEPARTMENT OF LABOR REGULATIONS

29 C.F.R. §2510.3-1(a)(3)

(a) General.

(1) The purpose of this section is to clarify the definition of the terms "employee welfare benefit plan" and "welfare plan" for purposes of Title I of the Act and this chapter by identifying certain practices which do not constitute employee welfare benefit plans for those purposes. In addition, the practices listed in this section do not constitute employee pension benefit plans within the meaning of section 3(2) of the Act, and, therefore, do not constitute employee benefit plans within the meaning of section 3(3). Since under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I of the Act, the practices listed in this section are not subject to Title I.

(2) The terms "employee welfare benefit plan" and "welfare plan" are defined in section 3(1) of the Act to include plans providing "(i) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (ii) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Under this definition, only plans which provide benefits described in section 3(1)(A) of the Act or in section 302(c) of the Labor-Management Relations Act, 1947 (hereinafter "the LMRA")(other than pensions on retirement or death) constitute welfare plans. For example, a system of payroll deductions by an employer for deposit in

savings accounts owned by its employees is not an employee welfare benefit plan within the meaning of section 3(1) of the Act because it does not provide benefits described in section 3(1)(A) of the Act or section 302(c) of the LMRA. (In addition, if each employee has the right to withdraw the balance in his or her account at any time, such a payroll savings plan does not meet the requirements for a pension plan set forth in section 3(2) of the Act and, therefore, is not an employee benefit plan within the meaning of section 3(3) of the Act).

(3) . . .The benefits described in section 302(c)(6) of the LMRA but not in section 3(1)(A) of the Act are " * * * holiday, **severance or similar benefits**". Thus, **the effect of section 3(1)(B) of the Act is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized).**

(emphasis added)

29 C.F.R. §2510.3-2(b)

(b) Severance pay plans.

(1) For purposes of Title I of the Act and this chapter, an arrangement shall not be deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that:

(i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;

(ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and

(iii) All such payments to any employee are completed,

(A) In the case of **an** employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and

(B) In the case of all other employees, within 24 months after the termination of the employee's service.

(2) For purposes of this paragraph (b),

(i) "Annual compensation" means the total of all compensation, including wages, salary, and any other benefit of monetary value, whether paid in the form of cash or otherwise, which was paid as consideration for the employee's service during the year, or which would have been so paid at the employee's usual rate of compensation if the employee had worked a full year.

(ii) "Limited program of terminations" means a program of terminations:

(A) Which, when begun, was scheduled to be completed upon a date certain or upon the occurrence of one or more specified events;

(B) Under which the number, percentage or class or classes of employees whose services are to be terminated is specified in advance; and

(C) Which is described in a written document which is available to the Secretary upon request, and which contains information sufficient to demonstrate that the conditions set forth in paragraphs (b)(2)(ii)(A) and (B) of this section have been met.

* * *

TREASURY REGULATIONS

26 C.F.R. §1.401(a)(4)-3(a), (f)(5)

§1.401(a)(4)-3 Nondiscrimination in amount of employer-provided benefits provided under a defined benefit plan.

(a) Introduction--(1) Overview. This section provides rules for determining whether the employer-provided benefits under a defined benefit plan are nondiscriminatory in amount as required by § 1.401(a)(4)-1(b)(2)(iii). . . .

* * *

(f) Special rules--(1) In general. The special rules in this paragraph (f) apply for purposes of applying the provisions of this section to a defined benefit plan. Any special rule provided in this paragraph (f) that is optional must, if used, apply uniformly to all employees.

* * *

(5) Unpredictable contingent event benefits--(i) General rule. In general, an unpredictable contingent event benefit (within the meaning of section 412(l)(7)(B)(ii)) is not taken into account under this section until the occurrence of the contingent event. Thus, the special rule in § 1.401(a)(4)- 4(d)(7) (treating the contingent event as having occurred) does not apply for purposes of this section. In the case of an unpredictable contingent event that is expected to result in the termination from employment of certain employees within a period of time consistent with the rules for defining an early retirement window benefit in paragraph (f)(4)(iii) of this section, the unpredictable contingent event benefit available to those employees is permitted to be treated as an early retirement window benefit, thus permitting the rules of paragraph (f)(4) of this section to be applied to it.

* * *

26 C.F.R. §1.401(a)(4)-4(e)(2)

§1.401(a)(4)-4 Nondiscriminatory availability of benefits, rights and features

* * *

(2) Ancillary benefit. The term ancillary benefit means social security supplements (other than QSUPPs), disability benefits not in excess of a qualified disability benefit described in section 411(a)(9), ancillary life insurance and health insurance benefits, death benefits under a defined contribution plan, preretirement death benefits under a defined benefit plan, **shut-down benefits not protected under section 411(d)(6), and other similar benefits.** . . .

26 C.F.R. § 1.411(a)-4

§ 1.411(a)-4T Forfeitures, suspensions, etc.

(a) Nonforfeitability. Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a **right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time. Certain adjustments to plan benefits such as adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable.**

* * *

(emphasis added)

26 C.F.R. §1.411(a)-7(a)

§ 1.411(a)-7 Definitions and special rules.

(a) Accrued benefit. For purposes of section 411 and the regulations thereunder, the term "accrued benefit" means–

(1) Defined benefit plan. In the case of a defined benefit plan–

(i) If the plan provides an accrued benefit in the form of an annual benefit commencing at normal retirement age, such accrued benefit, or

(ii) If the plan does not provide an accrued benefit in the form described in subdivision (i) of this subparagraph, an annual benefit commencing at normal retirement age which is the actuarial equivalent (determined under section 411(c)(3) and §1.411(c)-5) of the accrued benefit determined under the plan. In general, the term "accrued benefits" refers only to pension or retirement benefits. . . .

* * *

26 C.F.R. §1.411(a)-7(c)

(c) Normal retirement benefit--(1) In general. For purposes of section 411 and the regulations thereunder, the term "normal retirement benefit" means the periodic benefit under the plan commencing upon early retirement (if any) or at normal retirement age, whichever benefit is greater.

* * *

(3) Benefits included. For purposes of this paragraph, **the normal retirement benefit under a plan shall be determined without regard to ancillary benefits not directly related to retirement benefits such as medical benefits or disability benefits not in excess of the qualified disability benefit**; see section 411(a)(7) and paragraph (a)(1) of this section. For this purpose, a qualified disability benefit is a disability benefit which is not in excess of the amount of the benefit which would be payable to the participant if he separated from service at normal retirement age (emphasis added).

26 C.F.R. §1.417(e)-1(d)
(as formulated before 1995)

(d) Present value requirement--(1) Requirements. For purposes of determining the present value of any accrued benefit and for purposes of determining the amount . . . of any distribution including a single sum, a defined benefit plan is subject to the interest rate limitations described in subparagraph (2) of this paragraph (d) . . . **The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with this paragraph.**

(2) Section 417 interest rate. The [Code] section 417 interest rate is (i) the rate or rates that would be used by the Pension Benefit Guaranty Corporation (PBGC) for a trusteed single-employer plan to value the participant's (or beneficiary's) vested benefit ("applicable interest rate") if the present value of such benefit does not exceed $25,000 and (ii) 120 percent of the applicable interest, as determined in accordance with (i) above, if such present value exceeds $25,000. In no event shall the present value determined by use of 120 percent of the applicable interest rate result in a present value less than $25,000. . . . The applicable interest rates are the interest rates that would be used (as of the date of the distribution) by the PBGC for purposes of determining the present value of that benefit upon termination of an insufficient trustee single-employer plan. Except as otherwise provided by the Commissioner, the applicable interest rates are determined by PBGC regulations. See 29 CFR part 2619 for the applicable PBGC rates.

* * *

(emphasis added)

OTHER TREASURY/IRS AUTHORITY

IRS Notice 2003-10
2003-1 C.B. 369; 2003-5 I.R.B. 369;
2003 WL 77005 (Feb. 3, 2003)

Internal Revenue Service (I.R.S.)

Notice

DEFINITION OF EARLY RETIREMENT BENEFIT AND RETIREMENT-TYPE SUBSIDY

Released: January 10, 2003

Published: February 3, 2003

Definition of early retirement benefits and retirement-type subsidies. The IRS and the Treasury intend to propose regulations and are requesting comments regarding benefits that are treated as early retirement benefits or retirement-type subsidies for purposes of section 411(d)(6)(B) of the Code, including guidance on the extent to which payments that are contingent on the occurrence of an unpredictable event are protected under section 411(d)(6)(B). Notice 2002-46 modified.

I. PURPOSE

The Internal Revenue Service and the Treasury Department intend to propose regulations that would provide guidance on benefits that are treated as early retirement benefits and retirement-type subsidies for purposes of § 411(d)(6)(B) of the Internal Revenue Code. It is expected that the regulations would include guidance resolving conflicting court decisions that address the extent to which payments that are contingent on the occurrence of an unpredictable event, such as a plant shutdown, are protected under § 411(d)(6)(B). The Service and Treasury invite comments on possible approaches before

regulations are proposed.

II. BACKGROUND

Section 411(d)(6) generally provides that a plan is not treated as satisfying the requirements of § 411 if the accrued benefit of a participant is decreased by a plan amendment. Under § 411(d)(6)(B), a plan amendment that has the effect of eliminating or reducing a retirement-type subsidy, with respect to benefits attributable to service before the amendment, is treated as reducing accrued benefits for any employee who satisfies the pre-amendment conditions for the subsidy (either before or after the amendment). In addition, a plan amendment that has the effect of eliminating an early retirement benefit or, except as provided in regulations, an optional form of benefit is treated as reducing accrued benefits. Further, Treas. Reg. §1.411(d)-4, Q&A-1(d) specifies benefits that are ancillary and thus not protected from reduction or elimination under §411(d)(6)(B).

Section 645(b) of the Economic Growth and Tax Reform Reconciliation Act of 2001 (EGTRRA) amended § 411(d)(6)(B) to provide for the Secretary of Treasury to issue regulations permitting the elimination of benefits or subsidies that create significant burdens or complexities for the plan and plan participants, and that affect the rights of any participant in no more than a de minimis manner. In Notice 2002-46, 2002-28 I.R.B. 96, the Service and Treasury requested comments in advance of developing regulations implementing the EGTRRA amendment.

Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), Public Law 93-406, 88 Stat. 829, as amended, provides parallel rules to the rules of § 411(d)(6) of the Code. Pursuant to Reorganization Plan. No. 4 of 1978, 43 F.R. 47713, October 17, 1978, 1979-1 C.B. 480, Treasury regulations issued under §411(d)(6) apply as well for purposes of § 204(g) of ERISA.

Section §411(d)(6)(B) was added to the Code by § 301 of the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98

Stat. 1426, 1450-51 (1984). With respect to retirement-type subsidies, the legislative history relating to § 301 of REA states, in part:

> The bill provides that an amendment of a qualified plan is to be treated as reducing accrued benefits if, with respect to benefits accrued before the amendment is adopted, the amendment has the effect of either (1) eliminating or reducing an early retirement benefit or a retirement-type subsidy, or (2) except as provided by Treasury regulations, eliminating an optional form of benefit.
>
> * * *
>
> The bill provides that the term "retirement-type subsidy" is to be defined by Treasury regulations. The committee intends that under these regulations, a subsidy that continues after retirement is generally to be considered a retirement-type subsidy. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy. The committee expects that Treasury regulations will prevent the recharacterization of retirement-type benefits as benefits that are not protected by the provision.

S. Rep. No. 98-575, at 28, 30 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2574, 2576.

Questions have arisen as to whether a benefit that is contingent on the occurrence of an unpredictable event, such as a plant shutdown or an involuntary separation, is a retirement-type subsidy and, thus, protected by § 411(d)(6). Since the enactment of REA, three circuit courts have held that an unpredictable contingent event benefit is protected, while one has held that it is not. Compare Bellas v. CBS, Inc., 221 F.3d 517 (3rd Cir. 2000), cert. denied, 531 U.S. 1104 (2001) (separation benefit is both an early retirement benefit and a

retirement-type subsidy to the extent it provides for the payment of normal retirement benefits that continue beyond normal retirement age); Richardson v. Pension Plan of Bethlehem Steel Corp., 67 F.3d 1462 (9th Cir. 1995), withdrawn, 91 F.3d 1312 (9th Cir. 1996), modified, 112 F.3d 982 (9th Cir. 1997) (shutdown benefit is a retirement-type subsidy protected under anticutback rule, opinion withdrawn and modified because court later found plan amendment not valid), and Harms v. Cavenham Forest Industries, Inc., 984 F.2d 686 (5th Cir.), cert. denied, 510 U.S. 944 (1993) (involuntary separation benefit is a retirement-type benefit protected under the anticutback rule), with Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc., 847 F.2d 329 (6th Cir. 1988) (plant shutdown benefit is not a retirement-type subsidy).

III. UPCOMING PROPOSED REGULATIONS

The Service and Treasury anticipate that upcoming proposed regulations will provide general guidance concerning early retirement benefits and retirement-type subsidies under §411(d)(6)(B). The upcoming proposed regulations are expected to address whether benefits that are contingent on the occurrence of certain events, such as plant shutdown or involuntary separation, and that continue beyond normal retirement age, are retirement-type subsidies that are protected under §411(d)(6)(B) both before and after the occurrence of the contingency. In addition, the upcoming proposed regulations are expected to address the question of whether payment of the accrued benefit at an early commencement date on an unreduced or partially subsidized basis will be treated as providing a benefit that continues beyond normal retirement age and, hence, would be considered to be a retirement-type subsidy.

Section §411(d)(6) does not restrict the ability of an employer to amend a plan to eliminate accruals, subsidies, or other benefits (whether or not contingent), with respect to benefits not yet accrued. Thus, for example, the anticipated proposed

regulations would not restrict an employer from amending a plan to compute the subsidized portion of the contingent benefit based solely on service completed before the date of the amendment, or to limit the benefit payable under the retirement-type subsidy to the amount payable as of the date of the amendment. In addition, because §411(d)(6) does not prevent an employer from amending a plan to eliminate ancillary benefits, the anticipated proposed regulations would not restrict a plan amendment to eliminate contingent benefits that are ancillary benefits. Thus, the anticipated proposed regulations would not restrict a plan amendment to eliminate an ancillary benefit described in Treas. Reg. §1.411(d)-4, Q&A-1(d) (e.g., a social security supplement that is not a qualified social security supplement under §1.401(a)(4)-12), regardless of whether the amendment occurs before or after the occurrence of any contingency on which the benefit is based.

IV. REGULATIONS WILL BE PROSPECTIVE

The regulations described above will be prospective. Regardless of the position taken in the final regulations, the Service will not treat a plan as failing to satisfy the requirements of §§401 and 411 merely because of a plan amendment that eliminates or reduces an early retirement benefit or retirement-type subsidy that is conditioned on the occurrence of an unpredictable contingent event (within the meaning of section § 412(1)) if the amendment is adopted and effective prior to the occurrence of the contingent event and prior to the publication of final regulations addressing this issue in the Federal Register. Note, however, that it is clear under current law that such a plan amendment is prohibited under §411(d)(6) and §411(a) (which provides vesting requirements for accrued benefits and prohibits forfeiture of a vested accrued benefit) if the amendment is adopted or effective after the occurrence of the contingent event.

V. COMMENTS REQUESTED

Comments regarding the anticipated proposed regulations described in this notice are requested, including comments on the guidance that should be provided regarding early retirement benefits and retirement-type subsidies. In addition, comments are requested on the extent to which such proposed regulations should include relief for amendments that eliminate or reduce early retirement benefits or retirement-type subsidies that are contingent on unpredictable events, that create significant burdens or complexities for the plan and plan participants, and that affect the rights of any participant in no more than a de minimis manner. Comments should be submitted by May 5, 2003, to CC:ITA:RU (Notice 2003-10), Room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, D.C. 20044. Comments may be hand delivered between the hours of 8 a.m. and 5 p.m., Monday through Friday to CC:ITA:RU (Notice 2003-10), Courier's Desk, Internal Revenue Service, 1111

Constitution Ave., NW, Washington D.C. Alternatively, comments may be submitted via the Internet at Notice.Comments@irscounsel.treas.gov. All comments will be available for public inspection.

VI. EFFECT ON OTHER DOCUMENTS

Notice 2002-46 is modified.

DRAFTING INFORMATION

The principal authors of this notice are Preston Rutledge of the Office of the Associate Chief Counsel (Tax Exempt and Government Entities) and Diane S. Bloom of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, contact the Employee Plans taxpayer assistance telephone service between the hours of 8:00 a.m. and 6:30 p.m. Eastern Time, Monday through Friday by calling 1-877-829-5500 (a toll-free number). Mr. Rutledge can be reached at (202) 622-6090 and Ms. Bloom can be reached at (202) 283-9888 (not toll-free numbers).

Notice 2003-10, 2003-1 C.B. 369, 2003-5 I.R.B. 369, 2003 WL 77005 (IRS NOT)

END OF DOCUMENT

IRS Notice 97-11

1997-1 C.B. 379, 1197-2 I.R.B.

1996 WL 747904 (Jan. 13, 1997)

Subsidies: Defined benefit plans may promise to pay benefits at various times and in alternative forms. Benefits paid at certain times or in certain forms may have a greater actuarial value than the basic retirement benefits payable at normal retirement age. When one form of benefit has a greater actuarial value than another form, the difference in value is often called a subsidy.

(emphasis added)

Rev. Rul. 92-66
1992-36 I.R.B. 11; 1992 WL 200296 (Aug. 20, 1992)

Internal Revenue Service (I.R.S.)

Revenue Ruling

EARLY RETIREMENT WINDOW BENEFIT

Published: August 20, 1992

26 CFR 1.411(d)-4: Section 411(d)(6) protected benefits.

(also Section 401; 1.401-1.)

Early retirement window benefit. Where a defined benefit pension plan is repeatedly amended so that an early retirement window benefit is available to certain employees for substantially consecutive, limited periods of time, the benefit is not required to be provided permanently if the facts and circumstances so warrant.

ISSUE

Do sections 411(d)(6) and 401(a)(25) of the Internal Revenue Code require that an early retirement window benefit be provided permanently to all employees under a plan where the employer amends its plan to make the benefit available for substantially consecutive, limited periods of time?

FACTS

Z, an employer, maintains a defined benefit pension plan (the "Plan") that is qualified under section 401(a) of the Code. The normal retirement age under the Plan is 65. The amount of an employee's retirement benefit at normal retirement age is an annuity equal to X percent of the employee's average annual compensation multiplied by the employee's years of service.

Employees are eligible for early retirement under the Plan after attaining age 55 and completing ten years of service. If an employee retires and begins to receive an annuity before normal retirement age, the Plan provides that the amount of the employee's annuity will be actuarially reduced to reflect early commencement.

During 1989, Z experiences a significant economic downturn. In response, Z announces to its employees that it is taking certain measures to reduce its operating costs, including reorganizing its business operations and reducing the workforce of its manufacturing division. As part of its efforts to reduce the manufacturing division's workforce, Z amends the Plan to make available an "early retirement window benefit. This benefit is available to any employee who works at a facility of the manufacturing division, who has attained age 55, who has completed at least five years of service and who retires during a limited period of time specified in the amendment. Under the terms of the amendment, eligible employees receive a normal retirement benefit that is not actuarially reduced to reflect early commencement. If an eligible employee retires from Z after the end of the specified period, the employee's eligibility for early retirement and the amount of the employee's benefit under the Plan are determined without regard to the early retirement window benefit.

Z continues to experience significant adverse business conditions in 1990 and 1991. In each of these years, Z takes further cost-reduction measures, including further reductions in its manufacturing division workforce. Z amends the Plan in each of these years to make available an early retirement window benefit that is substantially similar to the benefit offered in 1989. In 1992, economic conditions stabilize, but the cost-reduction measures, including the number of employees who elected the early retirement window benefit, do not meet Z's projections. Therefore, in 1992, Z amends the Plan to make available an early retirement window benefit that is substantially similar to the benefit offered in 1989, 1990, and 1991.

LAW AND ANALYSIS

Section 401(a) of the Code provides the general qualification requirements for pension, profit-sharing and stock bonus plans. Section 1.401-1(b) (1) (i) of the Income Tax Regulations provides that a pension plan within the meaning of section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years after retirement.

Section 401(a) (25) of the Code provides that, whenever the amount of any benefit is to be determined on the basis of actuarial assumptions, a defined benefit pension plan shall not be treated as providing definitely determinable benefits unless such assumptions are specified in the plan in a way that precludes employer discretion.

Section 411(d) (6) (A) of the Code provides that, subject to exceptions that are not relevant here, a plan qualified under section 401(a) may not be amended to reduce the accrued benefit of any participant. Section 4 11 (d) (6) (B) provides that a plan amendment that has the effect of eliminating or reducing an early retirement benefit, a retirement-type subsidy, or an optional form of benefit with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits.

Q&A-4 of section 1.411(d)-4 of the regulations provides that, subject to exceptions that are not relevant here, a plan violates sections 411(d) (6) and 401(a) of the Code, including section 401 (a) (25), if the plan permits either direct or indirect employer discretion to deny a participant a section 411(d) (6) protected benefit for which the participant is otherwise eligible (but for the employer's discretion).

Under Q&A-1 (c) (1) of section 1. 411 (d) -4 of the regulations, an employer cannot circumvent the prohibition against employer discretion in the administration of the plan, including through the adoption of plan amendments, where the effect is to eliminate a participant's valuable rights under the plan. Under this standard, plan amendments that make

benefits available for a limited period of time do not automatically result in the elimination of a participant's valuable right once that period of time has ended. Rather, the regulations preclude a pattern of plan amendments that would make benefits available only for a limited period of time if the plan amendments give rise to a reasonable expectation that the benefit is an ongoing feature of the plan, and therefore a valuable right.

Specifically, Q&A-l(c)(1) of section 1.411(d)-4 of the regulations provides as follows:

Generally, benefits described in section 4 11 (d) (6) (A), early retirement benefits, retirement-type subsidies, and optional forms of benefit are section 4 11 (d) (6) protected benefits only if they are provided under the terms of a plan. However, if an employer establishes a pattern of repeated plan amendments providing for similar benefits in similar situations for substantially consecutive, limited periods of time, such benefits will be treated as provided under the terms of the plan, without regard to the limited periods of time, to the extent necessary to carry out the purposes of section 411(d)(6), and, where applicable, the definitely determinable requirement of section 401(a)(25). A pattern of repeated plan amendments providing that a particular optional form of benefit is available to certain named employees for a limited period of time is within the scope of this rule and may result in such optional form of benefit being treated as provided under the terms of the plan to all employees covered under the plan without regard to the limited period of time and the limited group of named employees.

Whether the recurrence of plan amendments constitutes a pattern of amendments within the meaning of 1.411(d)-4 of the regulations is determined on the basis of the facts and circumstances. Although no one particular fact is determinative, relevant factors include: (i) whether the amendments are made on account of a specific business event or condition; (ii) the degree to which the amendment relates to the event or condition; and (iii) whether the event or condition is temporary or discrete or whether it is a permanent aspect of

the employer's business.

Z's amendments providing early retirement window benefits to employees of its manufacturing division were made in connection with Z's overall efforts to reorganize its business operations, reduce its operating costs, and reduce the manufacturing division's workforce. The facts indicate that the reduction of the manufacturing division is temporary and that the early retirement window benefits are limited to the duration of this event. Based on these facts, the recurrence of the plan amendments during this period does not give rise to a reasonable expectation that the window benefit is an ongoing plan feature and therefore a valuable right under the plan. Thus, the plan amendments do not contravene the standards of section 411(d)(6) of the Code and the definitely determinable benefits requirement under section 401(a)(25).

HOLDING

Sections 411(d)(6) and 401(a)(25) of the Code do not require that an early retirement window benefit be provided permanently to all employees under a plan when the employer amends its plan to make the benefit available for substantially consecutive, limited periods of time, if, based on the facts and circumstances, the repeated amendments do not contravene the purposes of section 411(d)(6) and the definitely determinable benefits requirement of section 401(a)(25).

Nothing in this revenue ruling relieves Employer Z or the Plan of the need to comply with other applicable Code requirements, including the nondiscrimination requirements imposed by section 401(a)(4) of the Code and the accrued benefit requirements under sections 411(b), including section 411(b)(1)(G).

DRAFTING INFORMATION

The principal authors of this revenue ruling are Thomas G. Schendt of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations) and John H. Turner of the Employee Plans Technical and Actuarial Division. For further information regarding this revenue ruling, contact Mr. Schendt on (202) 622-6060 or contact the Employee Plans Technical and Actuarial Division's taxpayer assistance telephone service or Mr. Turner between the hours of 1:30 and 4:00 p.m. Eastern time, Monday through Thursday, on (202) 622-6074/6075 or (202) 622-6214 respectively. None of these numbers is toll-free.

Rev. Rul. 92-66, 1992-2 C.B. 92, 1992-36 I.R.B. 11, 1992 WL 200296 (IRS RRU)

END OF DOCUMENT

LEGISLATIVE HISTORY

H.R. Rep. No. 93-807 (Feb. 21, 1974)

* * *

The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits. . . . To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

* * *

H.R. Conf. Rep. No. 93-1280 (Aug. 12, 1974)

The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits. . . . To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

* * *

OTHER AUTHORITATIVE MATERIALS

General Accounting Office Report, Private Pensions, Implications of Conversions to Cash Balance Plans No. GAO/HEHS-00-185 (Sept. 29, 2000)

Employer-provided pensions are an important source of income for many retired persons. To encourage employers to establish and maintain pension plans for their employees, the federal government provides preferential tax treatment under the Internal Revenue Code (IRC) for plans that meet certain requirements. The Joint Committee on Taxation estimates that in fiscal year 2000 the tax expenditure for qualified employer-sponsored pension plans will be about $76 billion. [n.1] In exchange for preferential tax treatment, an employer is required to design the pension plan within legal limits that are intended to improve the equitable distribution and security of pension benefits. . . .

* * *

Most of the firms we conducted in-depth interviews with stated that after conversion [to a cash balance plan] the majority of vested participants who have separated from the firm or retired opted for a lump sum payment, indicating its popularity.

* * *

(emphasis added).

PLAINTIFFS' TRIAL EXHIBITS

PEx. 1A–GTE Service Corporation
Plan for Employees' Pensions
(pertinent provisions, only)

ARTICLE I
INTRODUCTION

* * *

1.4 Tax Qualification of Plan and Trust. It is the intention of the Company that the Plan shall satisfy the requirements of ERISA, that the Plan shall be qualified under section 401(a) of the Code, and that the Trust Fund established under the Plan shall be tax-exempt under section 501(a) of the Code.

* * *

ARTICLE II
DEFINITIONS

When used in capitalized form in this Plan, the following terms shall have the following meanings, unless the context clearly requires a different meaning:

* * *

"Accrued Benefit" means for any participant, on any given date, the Service Pension (whether or not vested) that would be payable to the participant as of the month next following his Normal Retirement Date in accordance with Section 6.1, based on his Accredited Service and Average Annual Compensation as of the date as of which his Accrued Benefit is determined.

* * *

"Average Annual Compensation" means twelve (12) times the average of an Employee's Monthly Compensation over the sixty (60) consecutive calendar months during which the average of his Monthly Compensation is the highest. . . .

* * *

"Normal Retirement Age" means age 65 . . .

"Normal Retirement Date" means, effective January 1, 1988, the last day of the month during which an Employee or former Employee attains Normal Retirement Age.

* * *

"Pension" means a Service Pension, a Disability Pension, a Deferred Vested Pension, or a Spouse's Pension. Notwithstanding the preceding sentence, for purposes of Section 6.5, the term "Pension" shall not include a Spouse's Pension.

"Pension Commencement Date" meanss the date as of which a Pension is scheduled to commence.

* * *

"Plan Year" means the calendar year.

* * *

"Service Pension" means the payments under the Plan, by reason of an Employee's age and Accredited Service, to a Retired Employee for life, but does not include a Disability Pension or a Deferred Vested Pension.

* * *

ARTICLE V
ELIGIBILITY FOR PENSION

5.1 Normal Retirement. Any Employee who attains Normal Retirement Age shall have the right to Retire with a fully vested and nonforfeitable Service Pension commencing as of the first day of the month next following his Retirement.

5.3 Early Retirement.

(a) An Employee whose combined age and Accredited Service (of not less than 15 years) total 76 or more years, may Retire before attaining Normal Retirement Age and shall be entitled to a Service Pension. . . .

(b) Any salaried Employee with 15 or more years of Accredited Service whose employment is terminated by his employer for any reason other than age or cause before attaining Normal Retirement Age and whose employment is terminated either

(i) within 24 months of the date on which his age combined with his years of Accredited Service on the date of his termination of employment would equal 76, or

(ii) within 24 months of the date of his 55th birthday, if his combined age and years of Accredited Service equal or exceed 76 on the date of his termination of employment,

shall be eligible to be Retired on a Service Pension computed under Section 6.1 as of the last day of the month in which, if paragraph (i) applies, his age combined with his previously accrued years of Accredited Service equal 76 or, if paragraph (ii) applies, he attains age 55. However, in no eveent shall an Employee Retiring under this subsection (b) accrue Accredited Service for benefit computation purposes for any period after the date of his termination of employment. Effective for terminations of employment on or after January 1, 1995, the first sentence of this subsection (b) shall be applied without reference to the term "salaried" therein.

(c) The normal Pension Commencement Date of the Service Pension shall be the first day of the month next following the Employee's Normal Retirement Date. However, the Employee may elect, in accordance with Section 7.8, to have his Service Pension commence as of the first day of any month following his Early Retirement Date and preceding his Normal Retirement Date. The Service Pension of any Employee whose Pension Commencement Date occurs prior to attaining age 55 shall be reduced pursuant to the schedule set forth in section 6.1(b).

* * *

5.5 Deferred Vested Pension.

(a) Any Employee with 5 or more years of Vesting Service whose employment with the Affiliates terminates other than by death, but who does not qualify for a Service Pension or Disability Pension, shall be entitled to a Deferred Vested Pension. The normal Pension Commencement Date of the Deferred Vested Pension shall be the first day of the month next following the former Employee's Normal Retirement Date. However, if such former Employee has 15 or more years of Accredited Service, he may elect, in accordance with Section 7.8, to have his Deferred Vested Pension commence prior to his Normal Retirement Date on the first day of any month following the date on which his combined age and Accredited Service equal 76 years. . . . Effective for terminations of employment on or after July 1, 1992, if a former Employee has 10 or more years of Accredited Service, he may elect, in accordance with Section 7.8, to have his Deferred Vested Pension commence prior to his Normal Retirement Date on the first day of any month following the date on which he attains age 55. The Deferred Vested Pension of any former Employee whose Pension Commencement Date occurs prior to his Normal Retirement Date shall be reduced in Accordance with Section 6.3. . . .

* * *

ARTICLE VI

COMPUTATION OF PENSIONS AND FORM OF PAYMENT

6.1 Service Pension.

(a) Subject to subsections (b) through (d), below, the annual Service Pension payable to a Retired Employee in the form of a single life annuity commencing on the first day of the month next following his Normal Retirement Date shall equal the greater of the amounts determined under paragraphs (i) and (ii), below.

(i) The amount determined under this paragraph (i) is the product determined by multiplying the Retired Employee's years of Accredited Service by the sum of (1) 1.15 percent of his Average Annual Compensation not in excess of the Social Security Integration Level, and (2) 1.45 percent of his Average Annual Compensation in excess of the Social Security Integration Level.

(ii) The amount determined under this paragraph (ii) is the product determined by multiplying the Retiremed Employee's years of Accredited Service by 1.35 percent of his Average Annual Compensation.

(b) If an Employee begins receiving his Service Pension as of any date that precedes his Normal Retirement Date, the amount determined under subsection (a), above, shall be multiplied by the appropriate percentage indicated below:

Pension Commencing at Age	Percentage
55 and over	100%
54	97%
53	94%
52	91%
51	88%
50	85%
49 and under	82%

* * *

(c) The amount determined in subsections (a) and (b), above, shall not be less than the applicable amount according to the Employee's years of Accredited Service as set forth in paragraph (1) or (2), below, whichever is applicable.

(1) In the case of an Employee who terminates employment before January 1, 1995, his applicable amount shall be determined in accordance with the following table.

Years of Accredited Service		Applicable Amount
At least	But less than	
15	18	$2,100
18	19	$2,160
19	20	$2,280
20	30	$2,400
30	40	$3,000
40	N/A	$3,300

(2) In the case of an Employee who terminates employment on or after January 1, 1995, his applicable amount shall be determined in accordance with the following table:

Years of Accredited Service		Applicable Amount
At least	But less than	
15	20	$4,000
20	25	$5,200
25	30	$6,400
30	35	$7,600
35	40	$8,800
40	N/A	$10,000

* * *

6.3 Deferred Vested Pension. The annual Deferred Vested Pension payable after reaching Normal Retirement Age to a former Employee who qualifies for such a Pension shall be computed in the same manner prescribed in Section 6.1, except that the amount determined under Section 6.1(c) shall be:

(a) based on the Accredited Service the former Employee would have had at his Normal Retirement Date if his employment with the Affiliates had not been terminated until his Normal Retirement Date, and

(b) then multiplied by the ratio of the Employee's actual Vesting Service to the Vesting Service he would have had at his Normal Retirement Date if his employment with the Affiliates had not been terminated until his Normal Retirement Date.

If such former Employee is eligible, in accordance with Section 5.5, to elect to have his Deferred Vested Pension commence prior to his Normal Retirement Date, and he so elects in accordance with Section 7.8, the amount of such Deferred Vested Pension shall be reduced by multiplying his Deferred Vested Pension at his Normal Retirement Date by the appropriate factor in Table A.

* * *

6.5 Normal Forms of Payment.

(a) Unless he elcts another form of payment in accordance with the provisions of this Section 6.5,

(i) a participant who is married on his Pension commencement Date shall receive his Pension in the form of a Qualified Joint and Survivor Annuity, and

(ii) a participant who is not married on his pension Commencement Date shall receive his Pension in the form of a single life annuity.

(b) A participant may elect to waive the default form of Pension otherwise payable to him under subsection (a), above, and to receive his Pension in another form of benefit pursuant to the following terms and conditions:

* * *

6.6 Optional Forms of Payment.

* * *

(b) Lump Sum Distribution Option.

(i) any Employee who will qualify for a Pension under Section 5.1, 5.2, 5.3, or 5.5 may elect to receive his Pension in the form of a lump sum distribution. The amount of any such lump sum distribution shall be the actuarial present value (as of the Employee's Pension Commencement Date) of his Service Pension computed under Section 6.1 (or in the case of a Deferred Vested pension, as computed under Section 6.3) as a single life annuity commencing on his Pension Commencement Date. For purposes of this paragraph (i), actuarial present value shall be determined under whichever of the following assumptions produces the largest lump sum distribution:

* * *

ARTICLE XIV
GENERAL PROVISIONS

14.7 Titles and Headings. The titles to Articles and the headings of Sections, subsections, paragraphs, and subparagraphs in this Plan are placed herein for convenience of reference only and, as such, shall be of no force or effedt in the interpretation of the Plan.

* * *

PEx. 1B--ARTICLE XXII
ENHANCED EARLY RETIREMENT AND SEPARATION PROGRAM OF GTE SERVICE CORPORATION

22.1 Purpose.

This Article XXII is intended to provide Employees with additional benefits in light of the Company's need, as identified, in part, by the ongoing Corporate-Operating Group Staff Study, to reduce its workforce to address the temporary business conditions currently facing the Company and its Affiliates, and in light of the sale of the GTE Electrical Products Group. In general, this Article XXII provides additional retirement benefits to (i) Participants who elect, between September 21, 1992, and October 26, 1992, inclusive, to Retire or to Separate by November 27, 1992, and (ii) Participants who are involuntarily Separated between November 1, 1992 (or such other date specified by Appendix C to this Article XXII) and December 31, 1993.

22.2 Definitions. The following capitalized terms, when used in thsi Article XXII, shall have the following meanings, notwithstanding any different definitions of such terms elsewhere in the Plan.

* * *

(c) "EERP" means the Enhanced Early Retirement Program provided for in this Article XXII.

(g) "ISEP" means the Qualified Involuntary Separation Program provided for in this Article XXII.

(h) "Modified Average Annual Compensation" means a Special Separatee's Average Annual Compensation, but based on the Special Separatee's rate of compensation for the 36 consecutive months of employment during which he was compensated at the highest rates of pay.

* * *

(m) "SEP Annuity" means an annuity that is the actuarial equivalent of the SEP Lump Sum. For purposes of determining the SEP Annuity, actuarial equivalence shall be determined by using the Special Separatee's actual age (without regard to the provisions of Section 22.5(b)(i)) and whichever factors specified in Section 22.8(c)(i) would provide the greater lump sum if an annuity were being converted to an actuarially equivalent immediate lump sum payment. . . .

(n) "SEP Lump Sum" means a fixed amount equal to the lesser of

(i) The greater of

(A) 0.1 multiplied by the Special Separatee's Modified Average Annual Compensation, or

(B) the Special Separatee's Modified Average Annual Compensation multiplied by the sum of

(I) 0.037 multiplied by the Special Separatee's Accredited Service (not in excess of 10 years), and

(II) 0.047 multiplied by the Special Separatee's Accredited Service (in excess of 10 years); or

(ii) 1.2 multiplied by the Special Separatee's Modified Average Annual Compensation.

* * *

(q) "Special Retiree" means an EERP-Eligible Participant who Retires under the EERP pursuant to this Article XXII.

(r) "Special Separatee" means an Eligible Participant who Separates under the VSIP or the ISEP pursuant to this Article XXII.

* * *

(s) "Transition Annuity" means an annuity that is the actuarial equivalent of the Transition Lump Sum. For purposes of determining the Transition Annuity, actuarial equivalence shall be determined by using the Special Separatee's actual age (without regard to the provisions of Section 22.5(b)(i)) and whichever factors specified in Section 22.8(c)(i) would provide the greater lump sum if an annuity were being converted to an actuarially equivalent immediate lump sum payment. . . .

(t) "Transition Lump Sum" means a fixed amount equal to the Special Retiree's weekly rate of compensation as of the day immediately preceding his Retirement Date multiplied by four. . . .

(u) "VSIP" means the Qualified Voluntary Separation Incentive Program provided for in this Article XXII.

Each other capitalized term used in this Article XXII shall have the meaning set forth for such term elsewhere in the Plan.

* * *

22.5 Computation of Pensions Under the EERP.

(a) Each EERP-Eligible Participant who elects to Retiree as a Special Retiree under the EERP shall be entitled to a Service Pension, calculated in accordance with the provisions of the Plan as enhanced by paragraph (b) of this Section 22.5, instead of the Pension that woul be payable to him, without regard to this Article XXII, under the other provisions of the Plan. . . .

(b) For the purpose of computing the Service Pension of each Special Retiree under the EERP,

(i) the provisions of the Plan shall be applied to each Special Retiree as if on his Retirement Date:

(A) for purposes of determining any applicable early retirement reduction, the Special Retiree's age were equal to his actual age plus 60 additional months of age; and

(B) the Special Retiree's Accredited Service were equal to his Accredited Service (determined in accordance with the provisions of the Plan other than this Article XXII) plus 36 additional months of Accredited Service; and

(ii) the Service Pension shall be further enhance by the Transition Annuity.

Except to the extent otherwise provided in this Article XXII, the provisions of the Plan shall be applied to each Special Retiree on the basis of his actual age and the Accredited Service credite to him pursuant to the provisions of the Plan other than this Article XXII.

* * *

22.6 Computation of Pensions Under the VSIP.

(a) Each Eligible Participant who elects to Separate as a Special Separatee under the VSIp shall be entitled to

(i) a Service Pension if he is eligible for a Service Pension under Section 5.1 or 5.3, or

(ii) a Deferred Vested Pension if he is not described in paragraph (i) of this subsection (a) and he is eligible for a Deferred Vested Pension under Section 5.5,

with his Service Pension or Deferred Vested Pension, as the case may be, enhanced by the SEP Annuity. An Eligible Participant who elects to Separate as a Special Separatee under the VSIP and who is not eligible for a Service Pension or Deferred Vested Pension under the provisions of the Plan other than this Article II shall be entitled, pursuant to this Section 22.6 to a SEP Annuity (but not a Service Pension or Deferred Vested Pension).

(b)

(i) Notwithstanding subsection (a) of this Section 22.6, if a Special Separatee Separates under the VSIP and, as of his Separation Date, he is within 24 months of the date on which his years of Accredited Service (of not less than 15 years) combined with his years of age will equal 76, the Special Separatee shall be eligible for a Service Pension computed under Section 6.1, except as provided in paragrapn (ii) of this subsection (b), and enhanced by the SEP Annuity, instead of a Deferred Vested Pension computed under Section 6.3.

* * *

22.7 Computation of the Pension Under the ISEP.

(a) . . .

(b) Each Eligible Participant who Separates as a Special Separatee under the ISEP shall be entitled to

(i) a Service Pension if he is eligible for a Service Pension under Section 5.1 or 5.3, or

(ii) a Deferred Vested Pension if he is not described in paragraph (i) of this subsection (b) and he is eligible for a Deferred Vested Pension under Section 5.5,

with his Service Pension or Deferred Vested Pension, as the case may be, enhanced by the SEP Annuity. An Eligible Participant who is Separated under the ISEP and is not eligible for a Service Pension or Deferred Vested Pension under the provisions of the Plan other than this Article XXII shall be entitled, pursuant to this Section 22.7 to a SEP Annuity (but not to a Service Pension or a Deferred Vested Pension).

(c)

(i) Notwithstanding subsection (b) of this Section 22.7 and Section 5.3(b)(i), if a Special Separatee Separates under the ISEP and, as of his Separation Date, he is within 24 months of the date on which his years of Accredited Serfice (of not less than 15 years) combined with his years of age will equal 76, the Special Separatee shall be eligible for a Service Pension computed under Section 6.1, except as provided in paragraph (ii) of this subsection (c), and enhanced by the SEP Annuity, instead of a Deferred Vested Pension computed under Section 6.3.

* * *

22.8 Computation of Pensions Generally.

(a) No benefit shall accrue under this Article XXII. This Article XXII does not provide for an accrued benefit or an additional accrued benefit for any Employee, and the enhancement of a Special Retiree's Pension under Section 22.5, 22.6, or 22.7 does not constitute, and shall not be deemed to be, an accrued benefit. . . .

(b) The Transition Annuity or the SEP Annuity shall be paid at the same time and in the same form as the remainder (if any) of the Special Retiree's or Special Separatee's Pension. Notwithstanding any other provision of the Plan, including, but not limited to, Sections 5.3 and 5.5, a Special Retiree or Special Separatee may elect as his Pension Commencement Date the first day of any month following the later of his Retirement Date or Separation Date (whichever is applicable) or November 27, 1992; provided that such date is not later than the Pension Commencement Date that is otherwise required by provisions of the Plan . . .

(c)

(i) Any Eligible Participant who qualifies for a Pension under this Article XXII may elect, in accordance with the notice, timing and other election requirements that apply to the election of an alternative form of payment under Section 6.6, to receive his Pension in the form of a lump sum distribution. The amount of any such lump sum distribution shall be the actuarial equivalent of the Special Retiree's or Special Separatee's Service Pension or Deferred Vested pension (if any) as the case may be, computed under Section 6.1 or 6.3 (such computation to be based on, where appropriate, the enhanced age and Accredited Service attributed to the Special Retiree in accordance with Section 22.5(b)(i)) as a single life annuity plus any Transition Annuity or SEP Annuity to which the Eligible Participant is entitled. For purposes of this Article XXII, actuarial equivalence shall be determined by applying the 1971 Towers, Perrin, Forster & Crosby Forecast Mortality Table with ages set back two years; provided that actuarial equivalence shall be determined on the basis of the Special Retiree's actual age instead of any enhanced age attributed to him under Section 22.5(b)(i); and provided further that actuarial equivalence shall be determined on the basis of whichever of the following interest rates provides the greater lump sum distribution:

(A) . . .

(B)

(I) the PBGC interest rate, if the vested accrued benefit to be distributed applying the PBGC interest rate is not more than $25,000; or

(II) an interest rate equal to 120 percent of the PBGC interest rate, if the vested accrued benefit to be distributed applying the PBGC interest rate is more than $25,0000, but in no event will the amount of the lump sum computed under this subparagraph (B) be less than $25,0000.

for purposes of this subparagraph (B), the Transition Annuity or SEP Annuity shall be disregarded in determining whether a Participant's vested accrued benefit exceeds $25,000 (and thus whether clause (I) or (II) of this subparagraph (B) applies).

* * *

(emphasis added)

PEx. 5-GTE Service Corporation, Unanimous Consent of Board of Directors, June 1, 1995 (relevant parts, only)

* * *

RESOLVED FURTHER: That Policy 104 (and any other policy that provides separation pay) shall not be in effect for a business unit during any period during which an involuntary separation program (including, but not limited to, Article XXV of the Service Corporation Pension Plan and Article XXXIII of the Telephone Operations Pension Plan) is in effect for the business unit; provided that this resolution shall not apply to any employee who would be eligible for Policy 104 (or any other policy that provides separation pay) if this resolution did not apply and who separated from employment before the involuntary separation program became effective with respect to the employee's business unit.

* * *

PEx. 9--SECOND AMENDMENT TO THE GTE SERVICE CORPORATION PLAN FOR EMPLOYEES' PENSIONS

As amended and Restated Effective January 1, 1989, on December 30, 1994

This Amendment made as of this 29th day of December 1995, by GTE Service Corporation (the "Company").

* * *

1. Effective on December 31, 1995, each of the plans listed below (a "Merged Plan") shall be merged into the Plan (the "Merger"). . . .

   - GTE Telephone Operations Salaried Pension Plan,

   - Salaried Employees Retirement System of GTE Hawaiian Telephone Compnay Incorporated, and

   - GTE Overseas Corporation Plan for Employees' Pensions.

* * *

PEx. 12-1997 INVOLUNTARY SEPARATION PROGRAM FOR THE GTE SERVICE CORPORATION PLAN FOR EMPLOYEES' PENSIONS:

ARTICLE XXVII

* * *

[I]f on or after August 1, 1997, the Special Separatee receives notice of separation and Separates on or after August 1, 1997, the SEP Lump Sum shall be equal to 50% of the amount determined pursuant to the preceding provisions of this Section 27.2(h) unless, the Special Separatee . . . executes a release prior to the Separation Date . . . in substantially the form attached hereto as Exhibit A . . .

* * *

PEx. 14-1998 INVOLUNTARY SEPARATION PROGRAM FO THE GTE SERVICE CORPORATION PLAN FOR EMPLOYEES' PENSIONS

ARTICLE XXIX

* * *

[T]he SEP Lump Sum shall be equal to 50% of the amount determined pursuant to the preceding provisions of this Section 29.2(h) unless the Special Separatee . . .

(i) executes a release in substantially the form attached hereto as Exhibit A

* * *

PEx. 19B-ARTICLE XXXIII [of the TelOps Plan] 1995 SEPARATION PROGRAM OF GTE TELEPHONE OPERATIONS

33.1 Purpose. This Article XXXIII is intended to provide Employees with additional benefits in light of the Company's need to reduce its workforce based on technological changes currently being implemented and on the changes in business focus in response to current competitive forces. In general, this Article XXXIII provides additional retirement benefits to Participants who are involuntarily Separated between January 1, 1995 and December 31, 1995.

* * *

PEx. 27-GTE Hawaiian Telephone Company Incorporated, Unanimous Consent to Corporate Action Without a Meeting of the Board of Directors, June 12, 1995 (relevant parts, only)

* * *

RESOLVED FURTHER, that Policy 104 (and any other policy that provides separation pay) shall not be in effect for a business unit during any period during which an involuntary separation program (including, but not limited to, Article XX of the Pension Plan) is in effect for the business unit; provided that this resolution shall not apply to any employee who would be eligible for Policy 104 (or any other policy that provides separation pay if this resolution did not apply) and who separated from employment before the involuntary separation program became effective with respect to the employee's business unit.

* * *

(emphasis added)

PEx. 35-INVOLUNTARY SEPARATION PROGRAM BENEFITS June 1, 1993 [booklet]

* * *

Your ISEP benefits will be based on service and pay through your separation date. It will include both the value of the ISEP separation amount plus the value of your deferred vested pension, if applicable.

The formula used to calculate your ISEP separation amount is:

- 3.7% of your highest consecutive 3-year average pay for each of your first 10 years of service

plus

- 4.7% of your highest consecutive 3-year average pay for each additional year of service

Your ISEP separation amount cannot be less than 10% or more than 120% of your 3-year average pay.

* * *

(emphasis added)

PEx. 36–INVOLUNTARY SEPARATION PROGRAM BENEFITS
January 1, 1996 [booklet]

* * *

Your ISEP benefits will be based on service and pay through your separation date. It will include both the value of the ISEP separation amount plus the value of your deferred vested pension, if applicable.

The formula used to calculate your ISEP separation amount is:

- 3.7% of your highest consecutive 3-year average pay for each of your first 10 years of service

plus

- 4.7% of your highest consecutive 3-year average pay for each additional year of service

Your ISEP separation amount cannot be less than 10% or more than 120% of your 3-year average pay.

* * *

(emphasis added)

PEx. 37–Benefits Highlights:
Involuntary Separation Employee Program [booklet]
GTE Service Corporation
1998

* * *

Separation Calculation
The formula used to calculate your ISEP payment under this program is:

- 3.7% of your highest consecutive three-year average pension plan recognized pay (excluding certain bonus payments) for each of your first ten years of pension plan accredited service

PLUS

- 4.7% of your highest consecutive three-year average pension plan recognized pay (excluding certain bonus payments) for each additional year of pension plan accredited service.

(This calculation amount cannot be less than 10% or more than 120% of your three-year average pension plan recognized pay (excluding certain bonus payments).)

* * *

In order to receive total <u>separation</u> benefits, you will need to sign a Separation Agreement and General Release . . .

* * *

Participants whose salary grade is ten or higher are guaranteed a minimum ISEP benefit or Executive <u>Severance</u> Minimum.

* * *

(underlined emphasis added)

PEx. 38-GTE Telephone Operations
Separation Benefits Program [booklet]
Final Draft
March 15, 1993

* * *

The VSIP pays a lump sum separation amount . . .

* * *

HOW VSIP BENEFITS ARE CALCULATED

Your VSIP benefit consists of a payment based on your years of service and your salary plus the value of your early retirement or vested pension benefit, if any. . . .

The VSIP payment amount is based on the following formula:

> 3.7% of your highest consecutive three-year average pay for 10 years of service or less
>
> plus
>
> 4.7% of your highest consecutive three-year average pay for additional years of service over 10.

Your VSIP lump sum amount can't be less than 10% or more than 120% of your three-year average pay.

* * *

This amount would be added to the lump sum value of your regular early retirement benefit, if eligible, or your regular vested pension benefit.

* * *

Three-year average pay is used only to compute the added VSIP lump sum payment. Generally, the VSIP lump sum amount is intended to be in line with competitive levels of involuntary severance payments.

* * *

(second underlined added)

PEx. 39–VOLUNTARY SEPARATION BENEFITS PROGRAM BOOKLET
GTE Telephone Operations

* * *

Voluntary Separation Incentive Program (VSIP) . . . The VSIP pays a lump sum **separation** amount based on your average salary and years of service. . . .

* * *

HOW VSIP BENEFITS ARE CALCULATED

Your VSIP benefit consists of a payment based on your years of service and your salary plus the value of your early retirement or vested pension benefit, if any. . . .

The VSIP payment amount is based on the following formula:

> 3.7% of your highest consecutive three-year average pay for 10 years of service or less
>
> plus
>
> 4.7% of your highest consecutive three-year average pay for additional years of service over 10.

Your VSIP lump sum amount can't be less than 10% or more than 120% of your three-year average pay.

* * *

This amount would be added to the lump sum value of your regular early retirement benefit, if eligible, or your regular vested pension benefit.

* * *

Three-year average pay is used only to compute the added VSIP lump sum payment. **Generally, the VSIP lump sum amount is intended to be in line with competitive levels of involuntary severance payments.**

* * *

(bold added; underlining in original)

PEx. 40-GTE TELEPHONE OPERATIONS
INVOLUNTARY SEPARATION PROGRAM
BENEFITS HIGHLIGHTS [booklet]
October 12, 1993

* * *

In addition, all other company policies governing separation pay and benefits including HR Policy #104 and enhanced HR Policy #104 are suspended until further notice.

* * *

The formula used to calculate your Involuntary Separation Benefits payment under this program is:

Separation Calculation

- 3.7% of your highest consecutive 3-year average pension plan recognized pay for each of the first 10 years of pension plan accredited service

PLUS

- 4.7% of your highest consecutive 3-year average pension plan recognized pay for each additional year of pension plan accredited service

This calculation amount cannot be less than 10% or more than 120% of your 3-year average pension plan recognized pay.

PLUS

- one of the pension calculations listed below (based on eligibility.)

* *

Deferred Vested Pension . . .

* * *

(first underlined emphasis added)

PEx. 41- GTE TELEPHONE OPERATIONS
INVOLUNTARY SEPARATION PROGRAM
BENEFITS HIGHLIGHTS [booklet]
January 25, 1994

* * *

In addition, all other company policies governing separation pay and benefits including HR Policy #104 and enhanced HR Policy #104 are suspended until further notice.

* * *

The formula used to calculate your Involuntary Separation Benefits payment under this program is:

Separation Calculation

- 3.7% of your highest consecutive 3-year average pension plan recognized pay for each of the first 10 years of pension plan accredited service

PLUS

- 4.7% of your highest consecutive 3-year average pension plan recognized pay for each additional year of pension plan accredited service

This calculation amount cannot be less than 10% or more than 120% of your 3-year average pension plan recognized pay.

PLUS

- one of the pension calculations listed below (based on eligibility.)

* * *

Deferred Vested Pension . . .

* * *

(first underlined added; all other emphasis in original)

PEx. 42–Benefits Highlights:
Involuntary Separation Employee Program [booklet]
1995

* * *

In addition, all other company policies governing separation pay and benefits including HR Policy #104 and enhanced HR Policy #104 are suspended until further notice.

* * *

The formula used to calculate your Involuntary Separation Benefits payment under this program is:

> 3.7% of your highest consecutive three-year average pension plan recognized pay for each of the first ten years of pension plan accredited service,
>
> **PLUS**
>
> 4.7% of your highest consecutive three-year average pension plan recognized pay for each additional year of pension plan accredited service
>
> (This calculation amount cannot be less than 10% or more than 120% of your three-year average pension plan recognized pay.)
>
> **PLUS**
>
> One of the pension calculations listed below (based on eligibility.)
>
> * * *
>
> Deferred Vested Pension . . .
>
> * * *

(underlined added; all other emphasis in original)

PEx. 43–Benefits Highlights:
Involuntary Separation Employee Program
1996
GTE Telephone Operations

* * *

In addition, all other company policies governing separation pay and benefits including HR Policy #104 and enhanced HR Policy #104 are suspended until further notice.

* * *

The formula used to calculate your Involuntary Separation Benefits payment under this program is:

> 3.7% of your highest consecutive three-year average pension plan recognized pay for each of the first ten years of pension plan accredited service,
>
> **PLUS**
>
> 4.7% of your highest consecutive three-year average pension plan recognized pay for each additional year of pension plan accredited service
>
> (This calculation amount cannot be less than 10% or more than 120% of your three-year average pension plan recognized pay.)
>
> **PLUS**
>
> One of the pension calculations listed below (based on eligibility.)
>
> * * *
>
> Deferred Vested Pension . . .
>
> * * *

(underlined added; all other emphasis in original)

PEx. 44–Benefits Highlights:
Involuntary Separation Employee Program
GTE
1998

* * *

Separation Calculation
The formula used to calculate your ISEP payment under this program is:

> 3.7% of your highest consecutive three-year average pension plan recognized pay (excluding certain bonus payments) for each of the first ten years of pension plan accredited service,
>
> **PLUS**
>
> 4.7% of your highest consecutive three-year average pension plan recognized pay (excluding certain bonus payments) for each additional year of pension plan accredited service
>
> (This calculation amount cannot be less than 10% or more than 120% of your three-year average pension plan recognized pay.)

* * *

In order to receive total separation benefits, you will need to sign a Separation Agreement and General Release . . .

* * *

(underlined added; bold in original)

PEx. 45–Benefits Highlights:
Involuntary Separation Employee Program
1995

* * *

In addition, all other company policies governing separation pay and benefits including HR Policy #104 and enhanced HR Policy #104 are suspended until further notice.

* * *

The formula used to calculate your Involuntary Separation Benefits payment under this program is:

3.7% of your highest consecutive three-year average pension plan recognized pay for each of the first ten years of pension plan accredited service,

PLUS

4.7% of your highest consecutive three-year average pension plan recognized pay for each additional year of pension plan accredited service

(This calculation amount cannot be less than 10% or more than 120% of your three-year average pension plan recognized pay.)

PLUS

One of the pension calculations listed below (based on eligibility.)

* * *

Deferred Vested Pension . . .

* * *

PEx. 49-EERP/ISEP
CHECKLIST
(relevant parts, only)

DATE STAMP HERE ➚

SOURCE CODES	PROGRAM BENEFIT TYPE
MT	( ) (E)ERP
MT	(✓) (D) VP + Isep
MT	( ) (S)ervice + Isep
IP	( ) (I)nvoluntary (no pension)

* * *

PEx. 50-APPLICATION FOR COMMENCEMENT OF SEPARATION PROGRAM BENEFITS

* * *

Employee's Name	Date of Birth	SS Number
Sheila Bowles	12/27/52	238-90-3992

* * *

OPTION VII: Lump Sum Distribution* [X] $46,392.46

* * *

* Includes the annuity value (or lump sum value) of your regular pension benefit plus the value of the separation payment

* * *

(last underlined added)

PEx. 51–Bowles' Separation Statement
(relevant part only)

12. Type of Payment (if yes above) **1. Severance** 2. Vacation 3. Holiday 4. Other		13. Last Date Covered by Payment 05 31 93	
Type	No. of Hours/Days Covered	Amount	Dates Covered
2	15 Days	$3,000.00	Lump Sum
1	**Separation**	**$28,248.68**	**Lump Sum**
4	Pension	$18,143.78	Lump Sum

* * *

(bold added)

PEx. 55–7/24/97 Letter from GTE
Denying Plaintiffs' Claims
(relevant parts only)

* * *

July 24, 1997

Bradford T. Yaker, Esq.
Hertz, Schram & Saretsky, P.C.
1760 S. Telegraph Road
Suite 300
Bloomfield Hills, Michigan 48302-0180

Re: **Sheila Wimbush-Bowles and Betty [sic] Connine**

* * *

- Under the ISEP each claimant elected to receive her benefit in a lump-sum. In calculating the amount of each claimant's lump-sum distribution, GTE first determined the Deferred Vested Pension payable on her respective pension payment date by applying Plan factors which are based on the PBGC's immediate interest rate, rather than the deferred interest rate; then, it converted this annuity to a lump-sum amount; and, finally, it added the lump-sum amount for the immediately payable Deferred Vested Pension to the SEP Lump Sum. . . .

* * *

PEx. 65–PERSONALIZED BENEFITS STATEMENT
for James L. Berger (relevant part, only)

* * *

Your ISP lump sum shown above includes both the value of the ISP lump sum <u>separation</u> amount of $29,849 and the lump sum value of your deferred vested pension of $54,282 . . .

* * *

THIS IS AN ESTIMATE

* * *

(underlined added)

PEx. 67–[REVISED] PERSONALIZED BENEFITS STATEMENT
for James L. Berger (relevant part, only)

* * *

Your ISP lump sum shown above includes both the value of the ISP lump sum separation amount of $32,141 and the lump sum value of your deferred vested pension of $59,222 . . .

* * *

(underlined added)

PEx. 68–PERSONALIZED BENEFITS STATEMENT
for James L. Berger (relevant part, only)

* * *

Your ISP lump sum shown above includes both the value of the ISP lump sum separation amount of $32,141 and the lump sum value of your deferred vested pension of $54,879 . . .

* * *

THIS IS AN ESTIMATE

* * *

(underlined added)

PEx. 69–PERSONALIZED BENEFITS STATEMENT
for James L. Berger (relevant part, only)

* * *

Your ISP lump sum shown above includes both the value of the ISP lump sum separation amount of $32,141 and the lump sum value of your deferred vested pension of $57,016 . . .

* * *

THIS IS AN ESTIMATE

* * *

(underlined added)

PEx. 70–PERSONALIZED BENEFITS STATEMENT
for James L. Berger (relevant part, only)

* * *

Your ISP lump sum shown above includes both the value of the ISP lump sum separation amount of $32,141 and the lump sum value of your deferred vested pension of $52,03 . . .

* * *

THIS IS AN ESTIMATE

* * *

(underlined added)

PEx. 75–ISEP Benefit Statement for James L. Berger,
(shows that ISEP lump sum without waiver and release agreement equals 50% of ISEP lump sum with waiver and release agreement)
(relevant parts, only)

* * *

ISEP Lump Sum Benefit w/Agree	$31,766.70
ISEP Lump Sum Benefit w/o Agree	$15,883.35

* * *

PEx. 79-4/5/96 Letter from Donna Chiffriller, GTE's Director of Benefit Plans, to James L. Berger (relevant parts, only)

* * *

April 5, 1996

Mr. James L. Berger
P.O. Box 10445
Honolulu, Hawaii 96816

Dear Mr. Berger:

* * *

The other part of the benefit is an additional amount payable from the qualified pension plan under the special amendment to the plan providing for the Involuntary Separation Program (ISEP). The benefit is calculated at termination and is expressed as a lump sum amount. . . .

* * *

The ISEP single-life annuity is based on the amount of money you could withdraw on a monthly basis over your lifetime if you received the lump sum and invested it. . . .

* * *

Very truly yours,

Donna C. Chiffriller
Director - Benefit Plans

* * *

PEx. 85-GTE Internal Memoranda Reflecting That the ISEP and VSIP Benefits Are Severance Benefits (relevant parts, only)

* * *

63. INVOLUNTARY SEPARATION PLAN

From Dallas . . . . HR Policy #104 was recently suspended and will not be revised until some unspecified time in the future. Until #104 is revised, involuntary separations will be conducted under a "Qualified Involuntary Separation Plan." The benefits of the QISP [i.e., the ISEP] are, in most cases, the same as those in our current voluntary plan. The process to involuntarily separate an employee is very similar to that used under #104, but because the severance benefit is funded from the pension plan, a few extra steps and additional time is necessary. . . . More info later. . . . Questions? Call Peter. . . .

* * *

HR104 separation benefits will be replaced with a new Involuntary Separation Program (ISP). The ISP pays a benefit based on years of accredited service [and] provides a benefit that is generally comparable to HR104.

* * *

Unlike the Voluntary Separation Incentive Program (VSIP) which ends May 1993, the ISP:

- has no minimum threshold for years of service to qualify;

* * *

(underlined added)

PEx. 90-10/17/95 Letter From GTE to Betty Conine (relevant parts, only)

GTE

INTRACOMPANY CORRESPONDENCE

GTE Telephone Operations

October 17, 1995

FLTP - Tampa, FL

To: Betty Conine

Subject: GTE TELEPHONE OPERATIONS REDUCTION IN FORCE

This letter serves as official notification of your separation from employment with GTE Telephone Operations. The effective date of separation will be November 16, 1995, unless you have secured another position with GTE before that date. Effective with your separation, you will be eligible for severance benefits under GTE's Involuntary Separation Program (ISP).

* * *

(underlined added)

DEFENDANTS TRIAL EXHIBITS

DEx. 28-4/20/93 Letter from GTE to Bowles, Notifying Bowles that She Was Being ISEP'd (relevant parts only)

GTE
GTE Service Corporation
One Stamford Forum
Stamford, CT 06904
203 965-2000

April 20, 1993

Sheila W. Bowles
Staff Manager-Corporate Procurement
GTE Service Corporation
One Stamford Forum Stamford, CT 06904

Dear Sheila,

* * *

[The purpose of this letter is to inform you that your position has been targeted for elimination effective May 31, 1993. If you are not placed elsewhere in GTE Service Corporation, you will be separated from employment on May 31, 1993.

If you are not assigned a comparable position before May 31, 1993, you will be eligible for separation benefits effective on may 31, 1993 as set forth in the Involuntary Separation Program.

* * *

(emphasis added)

TRIAL TRANSCRIPTS

4/17/01 Trial Transcript

* * *

Q. What is policy 104?

A. Policy 104 was a separation benefit-was-it was a - it was a separation arrangement, I'll say, because it really - I don't think we really considered it a benefit at that time. It was if a person was involuntarily separated for business reasons, they would receive a certain amount of salary continuation based on their years of service with the company.

Q. And those benefits would have been paid by the corporation itself and not by the plan?

A. That's correct. They were paid through regular payroll processing.

Q. Although at the time, if I understand what you are saying, there was a qualified plan which provided benefits, but this particular benefit - would you refer to it as a severance benefit?

A. It was a severance plan.

Q. Severance plan, HR 104?

A. Yes.

Q. All right. Although I'm jumping ahead a little bit, would you agree with me that during the relevant period that we're discussing with respect to the class that the HR 104 benefit and policies were suspended during the applicable period that the SEP and ISEp programs were initiated?

A. Yes. They were suspended for employees who were eligible for the ISEP benefit.

* * *

pp. 52-53 (testimony of Donna Chiffriller).

* * *

Q. I know it has been a while, but if I represent to you that the document that we have identified as Exhibit 86 2as part of Sheila Wimbush-Bowles' employment file, would that - wold that refresh your recollection as to whether you had an opportunity to review that particular document? 51, Im sorry.

* * *

A. It looks like something that you would provide to an employee in order to help them apply for unemployment compensation.

* * *

p. 108 (testimony of Donna Chiffriller re PEx. 51).

* * *

Q. Would it be a fair statement that the SEP lump sum is calculated separately from the DVP in determining what the lump sum value of the SEP is?

A. Yes. The ISEP benefit - or the SEP benefit is calculated according to a different formula than the basic pension.

Q. And do you know whether the company in fact calculated it that way?

A. I believe that they did.

* * *

pp. 113-114 (testimony of Donna Chiffriller).

* * *

Q. I just want to confirm, I thought I asked you earlier, but do you agree with me that the SEP benefit was intended to replace the severance program HR 104?

A. It was intended to be the severance program for employees, yes.

* * *

p. 129 (testimony of Donna Chiffriller).

* * *

Q. And based on the information that we have reviewed on this document so far and going down through up to where it says 120 percent rates, based on this information can you tell me whether the ISEP annuity at age 65 that Mr. Young computed, the $222.80 a month, whether that amount is actuarially equivalent to Sheila Wimbush-Bowles' ISEP lump sum amount of $28, 248.68 cents payable on July 1, 1993?

A. No it is not.

p. 213 (testimony of petitioners' expert actuary Chuck Monroe).

* * *

Q. When you did your calculations, and I don't necessarily expect you to remember the exact number, but was the SEP annuity that you calculated, again using the same 5 percent interest rate and 1971 TPF&C mortality table, was that amount larger than the amount Mr. Young has computed here at age 65?

A. It would be quite a bit larger.

Q. By approximately how much; do you recall?

A. I didn't extensively get into that, but I'm guessing around triple, more than that, somewhere there.

p. 215 (testimony of petitioners' expert actuary Chuck

Monroe).

> Q. Okay. So just so I'm clear, if we took the $222.80 a month and we discounted it using Mr. Young's factor, what would be the lump sum present value on July 1, 1993?
>
> A. It would be 9,032.
>
> Q. No 28,000?
>
> A. No.
>
> Q. Okay. Mr. Monroe, could you from this information on this document derive or compute a SEP annuity commencing at age 65 that is actuarially equivalent to Sheila Wimbush-Bowles' immediate SEP lump sum of $28,248.68 payable July 1, 1993?
>
> A. Yes.
>
> Q. And what would that amount be?
>
> A. That would be - having 28,248 now would produce an age 65 annuity of 696.82.

p. 217 (testimony of petitioners' expert actuary Chuck Monroe).

4/18/01 Trial Transcript

* * *

Q. Incidentally, Mrs. Galgano, you just mentioned separation benefit. And there has been some testimony about a severance pay policy at GTE. Are you generally familiar with GTE's severance pay policy?

A. I'm somewhat familiar with it, yes.

Q. Does the designation HR 104 mean something to you?

A. Yes, that's what we call the severance policy.

Q. Okay. What effect if any did the implementation of ISEP and VSIP have on HR 104?

A. the policy was suspended ruing the time that ISEP benefits were offered.

Q. Who was it suspended for?

A. It was suspended for anyone that was entitled to the ISEP benefit.

pp. 79-80 (testimony of Rita Galgano).

* * *

Q. What was the severance payment? How was it paid?

A. The severance was paid out of company funds. It was paid for - usually over time up to a maximum of 52 weeks, based on your service. . . .

pp. 80-81 (testimony of Rita Galgano).

* * *

Q. Okay. How intensively do you review those amendments?

A. I read them from beginning to end. And I make sure that they say what we want it to say according to the plan design.

p. 86 (testimony of Rita Galgano).

* * *

Q. You testified earlier that HR 104 was a severance program; is that correct?

A. A severance program, yes.

Q. And isn't it true that when GTE implemented these reduction in force programs that because of its financial state at the time it shifted the burden, the expense burden, to the plan?

A. I'm sure that was part of the result of paying a benefit from a plan and suspending the severance plan that --

Q. Isn't it true that it was --

A. It was a cost savings.

* * *

Q. Isn't it true that the plan was heavily overfunded in 1992 when these plans - when these programs were implemented?

A. I believe they were overfunded.

p. 104 (testimony of Rita Galgano).

* * *

THE COURT: So you would go in your office thinking about what the global policy of the higher-ups was to come to some understanding in your own mind about how to implement this policy; and then you would, with whatever experience you had in this regard, come up with an idea of how to accomplish that global policy.

THE WITNESS: Basically, yes.

THE COURT: And then you would communicate your ideas to somebody who would then put the pen to paper and create the plan itself?

THE WITNESS: Yes.

THE COURT: And then you would review what that person or persons - those persons came up with to make sure that it comported with what you understood you were trying to implement?

THE WITNESS: Yes, I would.

THE COURT: And in that context you would necessarily have to understand what this plan meant in order to -as written, in order to make sure that it complied with what you were trying to accomplish for the people who put the plan in motion?

THE WITNESS: I generally tried to. And if there's anything I don't understand, I usually ask the attorney that drafted the amendment does this say what I want it to say.

THE COURT: Who were the lawyers who drafted this amendment?

THE WITNESS: This particular one, article 22, was drafted by Margaret Landry, who was the attorney at the time.

THE COURT: In-house counsel or outside counsel?

THE WITNESS: In-house.

THE COURT: And at the time you reviewed it, you understood it?

THE WITNESS: I thought I did, yes.

pp. 116-117 (testimony of Rita Galgano).

* * *

Q. All right. It says that pension means a service pension, a disability pension, a deferred vested pension, or a spouses's pension.

* * *

Q. Does pension under this definition include the ISEP or the VSIP?

A. The ISEP is in article 22.

Q. All right. So we can agree that the term pension does not include the SEP benefit?

A. Right. I'm just talking about as a defined term here. Does not include --

THE COURT: Answer the questions yes or no.

THE WITNESS: Yes.

pp. 118-119 (testimony of Rita Galgano).

4/19/01 Trial Transcript

THE COURT: And what was the value of the - the present value of the SEP under this calculation?

THE WITNESS: The present value - of the 144?

THE COURT: Yes.

THE WITNESS: that present value was quite a bit smaller than $18,000,000. for the reasons that I think Mr. Monroe testified when he was on the stand, isthat the way - if you keep the SEP lump sum fixed througout the whole time, from the time it was first available toage 65, and then convert that same fixed amount to an annuity at 65, that annuity, once it is discounted back to the age at termination, has less value.

It is sort of - another way of looking at that rather than going through all of those complicated steps is would you rather have $18,0000 today or $18,000 20 years from now? And I would rather have it today because it has - I can then take it, put it in the bank, and it will grow to more than that amount later.

P. 37 (testimony of respondents' expert actuary Vincent Amoroso).

* * *

Q. Mr. Amoroso, stepping back from the mechanics of the test itself, does the result you have just testified to and that is reflected in Mr. Young's demonstrations surprise you?

A. No.

Q. Why not?

A. The -for the - I guess the reasons I touched on just a few minutes ago, as Mr. Monroe pointed out, the value of the SEP amount when it is converted to an annuity at age 65, the value at the time of termination is much much less than -and I think he pointed out that it was about a third of the amount that was actually paid. . . . .

pp. 48-49 (testimony of respondents' expert actuary Vincent Amoroso).

* * *

Q. Mr. Amoroso, I just have one question. If the court were to conclude that the age 65 SEP annuity must be actuarially equivalent to the immediate SEP lump sum, would the SEP annuity that you computed for Betty Conine on the deferred annuity sheet at 65 be much larger?

A. Actuarially equivalent -

Q. To the immediate SEP lump sum. Not a SEP lump sum payable at age 65, but an immediate SEP lump sum.

A. I'm not - I'm not understanding the question, what it is you are asking me to assume.

Q. If you need - if you were to assume that the age 65 SEP annuity had to be actuarially equivalent to an immediate SEP lump sum, not assuming that the SEP lump sum is payable at age 65, would the product of that computation be much larger than the SEP annuity at age 65 that you computed on your deferred annuity sheet for Betty Conine?

A. Just so that I understand the premise, you are suggesting that if the SEP lump sum were increased from the amount that was payable at the time that Ms. Conine, for example, terminated, if it was increased I guess with interest to age 65, so that it was bigger, tripled, then would it produce a different - and then that would produce a different annuity at 65, okay, I got that, then, next?

Q. Would that produce a different annuity at age 65?

A. Oh, yes. I just said so. Yes.

Q. I would agree that what you just described is the actuarial equivalent of the immediate SEP lump sum. When you said that it was growing over time, that's the same thing as saying that we're computing an age 65 annuity that is actuarially equivalent to the immediate SEP lump sum.

A. Well, I'm having a little trouble with that concept. That's not how I understand that the plan operates.

Q. I'm not asking as to whether the plan operates that way. I'm asking for testing purposes, let's say, if we were to conclude - the court were to conclude that the law requires or that the plan requires that the SEP annuity at age 65 be actuarially equivalent to an immediate SEP lump sum, you agree that the SEP annuity at age 65 would be much larger?

A. Yes.

pp. 51-53 (testimony of respondents' expert actuary Vincent Amoroso).

* * *

THE COURT: If the court were to determine that the normal retirement benefit in this case did not include the SEP lump sum under this plan, would this compliance calculation yield compliance or noncompliance?

THE WITNESS: I believe that if the court were to determine that the 417 minimum was in effect tested just against the DVP and then the portion of the cash that was paid, just looking at the piece attributable to the DVP, I think more money would have to be paid.

THE COURT: Did you calculate how much more money would have to be paid in that circumstance?

THE WITNESS: No. No, I didn't, Your Honor.

THE COURT: Do you have any idea how much would be paid?

p. 55 (testimony of respondents' expert actuary Vincent Amoroso).

* * *

THE WITNESS: I was just dividing to gt the factor. And I guess actually - right, it is - and that factor is approximately the same factor that appears in the Conine 417(e) compliance under the 100 percent PBGC rates that was performed by Mr. Young.

THE COURT: And so that difference is about $6,200?

THE WITNESS: Sorry, I just lost it here.

THE COURT: I think you told me 16,794.

THE WITNESS: Yeah. Yeah, twenty-three eight compared to, if you look at Conine immediate line six, it would be sixteen eight, so yeah, it is about $7,000.

p. 58 (testimony of respondents' expert actuary Vincent Amoroso).

* * *

> THE COURT: You and Mr. Young use a term a subsidy or subsidize to describe the effect of the static value of the SEP lump sum over the course of the life of the benefit. Whom or what does it subsidize if it is a subsidy in connection with the 417(e) compliance?
>
> THE WITNESS: The reason I referred to it as a subsidy is that the economic value to, for example, Ms. Conine, the economic value of the lump sum that was - the SEP lump sum that was available to her at the time of termination, the economic value to her was much greater than the corresponding economic value of that same benefit, not the dollars, but the benefit, the annuity attributable to those dollars that would have been payable at age 65. . .

pp. 59-60 (testimony of respondents' expert actuary Vincent Amoroso).

Defendants' (Respondents') Trial Brief

> Mr. Young [respondents' non-expert actuary] derived the SEP Annuity commencing at age 65 that would be worth $28,248.68 [Bowles' immediate SEP Lump Sum] *at age 65*.

Respondents' Trial Brief at 26 (emphasis in original) [bracketed text added].